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SUPREME COURT OF THE UNITED STATES

October Term, 1911.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

ADAM T. SILER, LAURENCE B. FINN AND LEV P. TAUETON, Individually, and as constituting the RAILROAD COMMISSION OF KENTUCKY, Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Court Below: Southern Judicature Circuit Court, Consisting of Circuit Judge Warrington, District Judge Walker Baker, Presiding Judge and District Judge Hazel.

BRIEF FOR APPELLEES.

Lawful of Power of the States to Regulate Rates.

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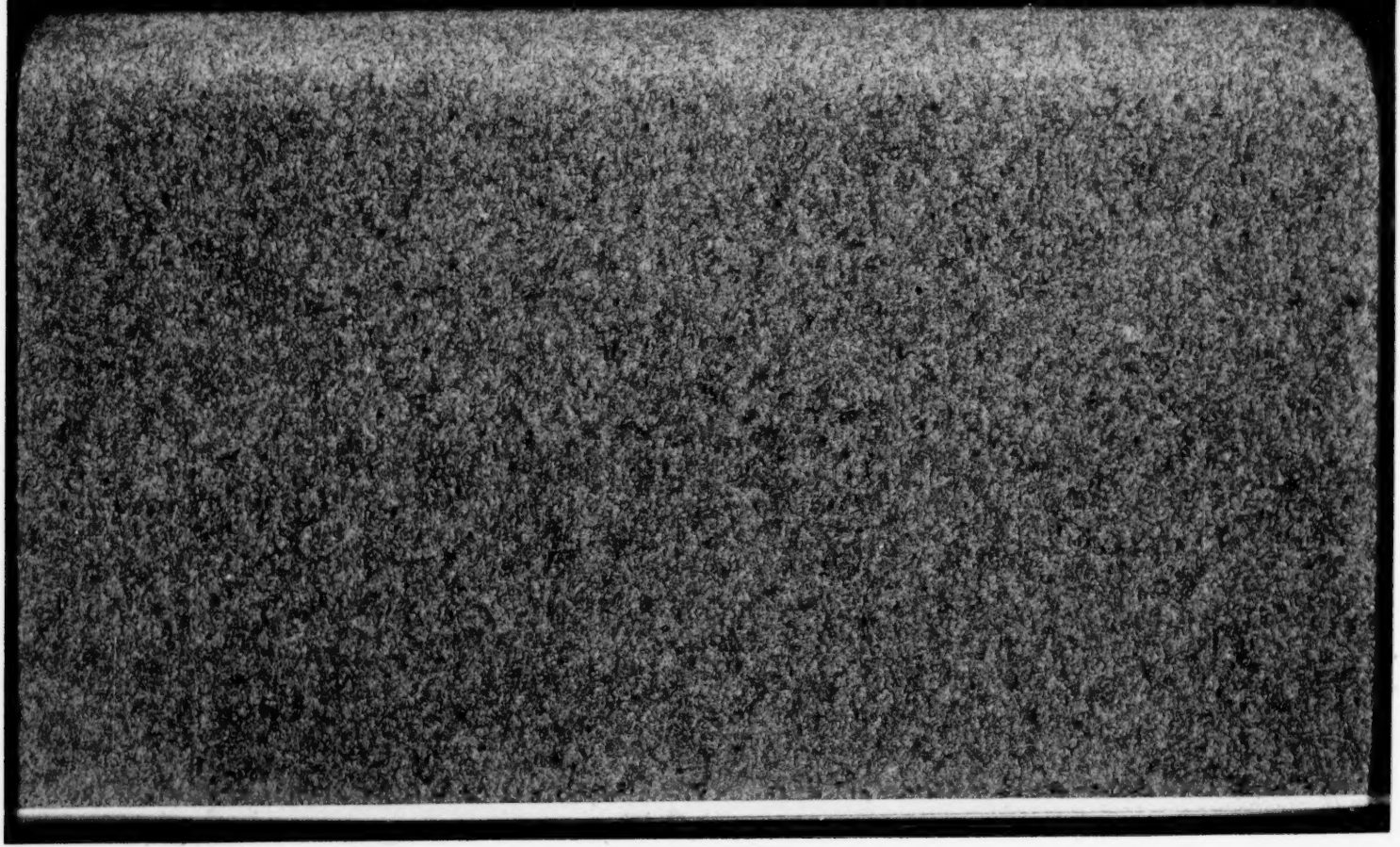

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vs.

ADAM T. SILER, LAURENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - *Appellees.*

BRIEF FOR APPELLEES.

This is an appeal from an order refusing to grant an interlocutory injunction. The bill was filed by the Louisville & Nashville Railroad Company against the three members of the Kentucky Railroad Commission as individuals and as constituting the Railroad Commission of Kentucky to enjoin them from putting into effect an order fixing rates to and from certain points on plaintiff's line, at which distillery plants are located, upon grain and other commodities used in the manufacture of whiskey, and also from putting into effect an order making reparation to the companies operating those plants on account of extortionate charges collected in the past. The defendants in making the first of the two orders com-

plained of, which will be referred to as the rate order, acted under the authority conferred upon them by Act of the Kentucky Legislature approved March 10, 1900, which is popularly called the McChord Act, and now appears as Section 8 70a of the Kentucky Statutes. The second order, which will be referred to as the reparation order, was made by defendants under other statutes.

The McChord Act makes it the duty of the Railroad Commission of Kentucky upon complaint or information that any railroad company is charging extortionate freight or passenger rates over its line of railroad in Kentucky, to investigate the matter as speedily as possible after ten days' notice by letter to the carrier of the time and place of hearing, the Commission being required to hear such "statements, arguments or evidence offered by the parties" as it may deem relevant. If upon this hearing the Commission finds that the carrier is or has been "guilty of extortion" it must fix a just and reasonable rate for the future, and if the carrier thereafter charges more than the rate thus fixed it is to be deemed "guilty of extortion," and punished as provided by the statute.

The complainant had for many years given special rates upon distillers' supplies to the distillers upon whose complaint the orders in question were made, and the withdrawal in March, 1910, of those special rates, which had been given in the form of rebates, upon the ground that the manufactured product was shipped out over the complainant's line, and which were lawful for that reason (Louisville & Nashville R. Co. v. Common-

wealth, 108 Ky. 628), was the occasion of the filing of the complaint before the Railroad Commission under which the orders attacked by the Louisville & Nashville Railroad Company, as complainant, were made. The change made by the withdrawal in March, 1910, of the special rates which had been in force resulted in an increase in some cases of one hundred per cent.

The order of the Commission fixing rates for the future, omitting the rates fixed, reads as follows:

> "The complainant herein, Greenbrier Distillery Company, and others, have heretofore filed their written complaint against the defendant, Louisville & Nashville Railroad Company, with exhibits thereto attached, and certified copies thereof have been transmitted by mail to the defendant, together with a written communication from the Chairman of the Commission advising defendant of the general nature of said complaint and fixing a date for the hearing of said complaint more than ten days thereafter, and in accordance therewith a meeting of the Commission was held at the Galt House in the city of Louisville, Kentucky, on the 24th day of June, 1910, at which time and place Commissioners A. T. Siler and Laurence B. Finn were present, and complainants and defendant appeared in person and by counsel, and all the testimony adduced by the parties was heard by the Commission, and by agreement of parties the 28th of July, 1910, was fixed for the hearing of arguments and the presentation of briefs by the parties, and on said day and date pursuant to said agreement the Commission met at the Galt House in said city, at which time and place arguments and briefs were presented to the Commission by plaintiffs and defendant, and the case was submitted for final orders.

"The Commission now being fully advised is of the opinion, and so orders, that the rates now charged, collected, and received by defendant for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust and unreasonable, and by charging said rates defendant is, and has been guilty of extortion.

"It is, therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be, and it is hereby forbidden to charge, collect or receive for the transportation of said commodities to and from said points wholly within the State of Kentucky, rates in excess of the following rates for the transportation of said commodities to and from said points, as follows:"

It does not appear from the bill how the quantity of the commodities covered by the rates complained of which are shipped to consignees other than the distillers compare with the quantity of such commodities shipped to the distillers, but affidavits filed by defendants in opposition to the motion for an interlocutory injunction show that the quantity shipped to others than the distillers at the several points in question is inconsiderable, and it also appears from the affidavits that the evidence heard by the Commission showed that at one or more of those points the distillers were the only persons receiving such commodities. District Judge Cochran, after granting a temporary restraining order, refused to sit in the case because he had as counsel attacked the statute which is here attacked by complainant, and Circuit Judge Warrington, to whom the case was then assigned, called to his assistance to hear the motion of complainant for an interlocutory injunction, District Judge Deni-

son, now Circuit Judge, and District Judge Sanford, this being done pursuant to Section 17 of the Act of Congress approved June 18, 1910, entitled:

"An act to create a commerce court, and to amend the act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, as hertofore amended, and for other purposes."

That section provides:

> "That no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any justice of the Supreme Court, or by any Circuit Court of the United States, or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge, and the other two may be either circuit or district judges. * * * An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The defendants filed demurrer to the whole of the bill upon the ground that the court was without jurisdiction, that the bill was wanting in equity, that it was multifarious, and that complainant had an adequate remedy at law, and also filed a demurrer to that part of the bill

which seeks to enjoin the enforcement of the reparation order. The court, after full argument both orally and by briefs, overruled the motion for an interlocutory injunction; but, upon condition that an appeal be perfected within thirty days and that the difference between the rates complained of and the rates fixed by the Commission be paid into court from month to month, the court continued in force the restraining order pending the appeal. The court in an elaborate and illuminating opinion (Trans., pp. 85-112) the reasoning of which we believe to be unanswerable, held the McChord Act and the rate order made pursuant thereto to be valid, but refused to pass upon the validity of the reparation order for the reason that the distillers upon whose complaint the order was made were necessary parties and were not before the court.

There is no allegation in the bill that the rates fixed are so unreasonably low as to deprive the complainant of its property without compensation, or that the rates are confiscatory, but merely that the rates fixed "are unreasonably low and unjust." It is alleged that the evidence introduced before the Commission bore no "proper relation" to the justness or reasonableness of rates for transporting the commodities and supplies in question when to be used for distilling purposes, and that no evidence was introduced which tended to show what might be a just or reasonable rate on the commodities in question between the points named in the order of the Commission. It is further alleged that the only question brought before the Commission for investigation was the

making and fixing of rates on certain commodities to be used in the manufacture of whiskey and that, therefore, the Commission had no power to make an order fixing rates on those commodities when used for other purposes. A copy of the complaint filed before the Commission is filed with the bill, and it appears from that copy that the complainants did ask the Commission to fix a rate for the transportation of the commodities named without regard to the purposes for which they might be used. (Trans., p. 57.) Besides, the statute does not require a written complaint, and only a notice by letter as to the "nature" of the matter to be investigated is necessary. There is no allegation in the bill that such notice was not given, or that the matter to which the order of the Commission relates was other than that of the proposed investigation of which complainant had notice. The Commission, therefore, had jurisdiction of the question upon which it passed, and the complainant merely places its judgment against that of the Commission as to what the evidence tended to show. There is no allegation that the Commission acted arbitrarily or in bad faith, or that it did not consider the evidence heard and in good faith determine that it showed that the rates fixed were reasonable. It is alleged, however, that the order of the Commission affects interstate rates, and is, therefore, a regulation of interstate commerce and void for that reason.

ARGUMENT.

I.

Statute Does Not Violate Fourteenth Amendment or Kentucky Constitution.

Two cases arising under the McChord Act have been before this court, the first of those cases being McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, and the second being Siler v. Louisville & Nashville R. Co., 213 U. S. 175. The first of these cases originated in the United States Circuit Court for the District of Kentucky, the State then not having been divided into two districts, and the second case originated in the Eastern District after the division of the State into the Western and Eastern Districts. In each of those cases this court refused to pass upon the validity of the statute. In the first case the court held that the suit for an injunction was premature as the Commission had not fixed any rates under the act. In the second case upon appeal from the Eastern District it was held that the Commission had no power to make complete schedules of rates, but only to pass upon special cases upon complaint or upon its own information.

The history of the McChord Act is important. In Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, the Court of Appeals of Kentucky held Section 816 of the Kentucky Statutes to be void for uncertainty to the extent that it created the criminal offense of extortion, the ground of that decision being that the carrier could

not possibly know in advance whether or not he was violating the law, no standard of reasonableness being fixed, thus leaving his guilt or innocence to be determined by the opinion of each jury as to what was reasonable. The McChord Act was then passed conferring upon the Railroad Commission the power to fix rates upon complaint or upon receiving information that extortionate freight or passenger rates have been charged, the rates thus fixed to be thereafter the only rates which the carrier may lawfully charge, and penalties being prescribed for charging rates in excess of those thus fixed. Neither the construction nor the validity of this statute has ever come before the Kentucky State courts for determination, but as already stated this court has twice considered the statute in proceedings in which it was directly attacked, and the court has also once considered the statute in a case in which it was not directly involved, the case referred to being Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503.

McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, was an appeal from a judgment of the United States Circuit Court for the District of Kentucky in the case of Louisville & Nashville R. Co. v. McChord, reported in 103 Fed. 216, in which District Judge Evans held the McChord Act to be unconstitutional, and enjoined the Railroad Commission from making any rates thereunder. In that case this court, reversing the judgment appealed from, held the McChord Act to be merely in aid of Section 816 of Kentucky Statutes, and that the various provisions of the Kentucky Statutes re-

lating to the offense of extortion attempted to be created by that section applied to the offense of extortion created by the McChord Act, from which the conclusion followed that no indictment could be returned for that offense unless recommended by the Railroad Commission as provided by Section 819 of Kentucky Statutes. The court then held that as no indictment could be returned except upon the recommendation of the Railroad Commission, the carrier could be fully protected after rates had been fixed by the Commission by a proceeding to enjoin the Commission from recommending indictments, and that the suit was therefore premature. This conclusion has an important bearing on the construction of the provisions of the statute as to penalties as will hereinafter be shown.

The principal ground upon which the statute is attacked is that it is void upon its face because it cuts off judicial inquiry as to the reasonableness of the rates fixed by the Commission, it being contended that such judicial inquiry is not only cut off by the provision that it shall not be lawful to charge more than the rate fixed by the Commission, but also by the provision for penalties which are alleged to be so excessive that the carrier can not take the risk of going into the courts to test the validity of the statute, although the complainant alleges that if the interlocutory injunction be refused, it will take that risk until compelled by the court of last resort to obey the order of the Commission.

That the fixing of rates whether by the Legislature or by a Commission pursuant to its authority is purely

legislative in its character can not now be doubted (City of Knoxville v. Knoxville Water Co., 212 U. S. 1), and the courts can never inquire as to the wisdom or reasonableness of legislative action. The only judicial inquiry allowed is whether or not the law-making body has exceeded its power. The word "reasonable" is used in one sense as applied to rates made by a carrier and in another and different sense as applied to maximum rates fixed by the Legislature or by some subordinate body to which the Legislature may have delegated the power to make rates, and some courts in considering cases of this nature have used the word "reasonable" first in the one sense and then in the other without indicating the change of meaning, thus causing confusion of thought. The distinction between these two uses of the word is pointed out by Judge Noyes with great clearness in his admirable work on "American Railroad Rates," in which at page 211, he says:

> "The standard of reasonableness applied by the courts in determining the validity of a schedule of rates prescribed by legislative authority, is essentially different from that considered in a controversy between a shipper and the railroad. As we have seen, the courts, under the common law, have power to pass upon the reasonableness of the charges of common carriers. In determining the question of reasonableness, the courts must consider all the factors entering into the rate. They may substitute their judgment of a just and proper charge for that of the carrier. But the courts can not substitute their judgment of a reasonable rate in place of that of the Legislature or the Legislature's subordinate body. The act of the Legisla-

> ture in fixing a rate is a law that such shall be the rate. The courts can no more question its expediency or propriety than in the case of any other law. It is immaterial whether they think, under all the circumstances, that it should have been greater or less. The courts have nothing to do with legislative-made rates except to determine whether they violate constitutional provisions. The inquiry is whether the rates prescribed by law are so unreasonably low as to infringe the property rights of the railroad. The duty of the courts is to determine whether the rates are confiscatory, not whether they are fair between shipper and carrier."

In Stone v. Farmers' Loan & Trust Co., 116 U. S. 307 (at p. 331), the court by Mr. Chief Justice Waite, thus stated the limitation which the law places upon the power of the State to regulate rates:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, the court distinctly held that the fixing of rates is not a judicial function, and that as to rates fixed by a commission the only question for the courts is whether or not the rates are so low as to work a practical destruction of rights of property.

In that case the court, by Mr. Justice Brewer, said (397):

> "The courts are not authorized to revise or change the body of rates imposed by a Legislature or a Commission; they do not determine whether one rate is preferable to another; or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work."

It has been so repeatedly held by this court that the only judicial inquiry which can be demanded as to rates fixed by law is as to whether or not they are confiscatory that it would be useless to review the cases, it being sufficient to merely cite a few of them.

St. Louis & S. F. R'y Co. v. Gill, 156 U. S. 649.
Smyth v. Ames, 169 U. S. 466.
Minneapolis, etc., R'y Co. v. Minnesota, 186 U. S. 257.
Prentis v. Atlantic Coast Line Co., 211 U. S. 210.
City of Knoxville v. Knoxville Water Co., 212 U. S. 1.
Willcox v. Consolidated Gas Co., 212 U. S. 19.
Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579.

In Chicago, etc., Co. v. Tompkins, 176 U. S. 167, upon which counsel for complainant relied in the lower court, the statute under which the schedule of rates complained of was made, manifestly declared the rates which might be fixed by the Commission to be the only legal rates, and yet the court assumed that it could only interfere in the event the rates should be found to be confiscatory. The court, referring to the Legislature, said:

> "Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts intervene."

The court also declared that the owners of railroad property may not be deprived of their property "by the arbitrary enactment of any legislature" without any right of appeal to the courts, but the court held that the complainant in that case was not deprived of its property by the "arbitrary enactment" of the Legislature unless the rates fixed by the Commission pursuant to legislative authority were so low as not to be compensatory. The court said that the burden was on the complainant to prove that the statute infringed "the constitutional guaranty of protection to property," and also held, in effect, that that guaranty was not infringed by the mere enactment of the statute, or by the action of the Commission thereunder, unless the rates fixed by the Commission were so low as not to yield a fair return. In fact, the court in that case seemed to assume that the rates were not unreasonably low if they would yield any profit whatever. The court further said in that case:

> "The case must be a clear one in behalf of the railroad company or the legislation of the State must be upheld."

In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, this court held that Section 218 of the Kentucky Constitution was not in conflict with the Federal Constitution. That section prohibits the charging of

more for a short haul than a long haul, over the same line in the same direction, the shorter being included within the longer distance, with the following proviso:

> "Provided, that upon application to the Railroad Commission such common carrier, or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this section."

The court held that the proviso quoted was valid, notwithstanding the great power which it confers upon the Commission, and notwithstanding the fact that the finding of the Commission is made final and conclusive. The court referred to the fact that the Kentucky Legislature had conferred upon the Commission the power to fix rates, and in a later part of its opinion, by Mr. Justice Shiras, said:

> "We do not wish to be understood as intimating that if, hereafter, the Railroad Commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description."

Again in the same case the court, after citing Smyth v. Ames, 169 U. S. 466, and other cases, said:

> "We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the Railroad Commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal Courts to interfere with the legislative department of the State government when acting within the scope of its admitted powers is always the exercise of a delicate power—one that should not be resorted to unless the reason for so doing is clear and unmistakable."

It is quite clear that the court believed that the principle upon which it based its decision was conclusive as to the power of the Legislature to authorize the Commission to fix rates which should be final, and that the only limitation upon the power was that the rates fixed should not be confiscatory.

As to the power of the Legislature to make the decision of the Commission final, the court said:

> "Finality is a characteristic of the judgment of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers

> have proceeded. If there are charges of fraud or corruption the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Counsel for the railroad company rely strongly upon the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. In that case the Commission was authorized to fix rates without hearing or notice, and the State court refused to give the carrier any hearing whatever as to whether or not the rates were reasonable. This court held that there must be a hearing at some stage of the proceeding, and that accepting the construction of the State court the statute must be held void. The State court had held that although the rates had been fixed without a hearing there could be no judicial inquiry as to the reasonableness of the rates even though they might be confiscatory. It is true that it does not appear that the response of the railroad company to the application for a writ of mandamus to put into force the rates fixed by the Commission alleged that those rates were so low as to be confiscatory, but the response did allege that they were unreasonably low, and the State court held that in no event could the courts inquire as to whether or not the rates were reasonable. It was clear, therefore, that if the judgment requiring the rates to be put into effect should stand the door would be closed to the carrier, under the construction which the State court placed upon the statute. There was no room, therefore, for the presumption that the carrier could have a hearing in

the State courts as to whether or not the rates were confiscatory.

In San Diego Land & Town Co. v. National City, 174 U. S. 739, the court undertook to determine what had been decided in the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. That case involved the validity of water rates fixed by municipal ordinance. The court, by Mr. Justice Harlan, after quoting from its opinion in the Minnesota case, said:

> "Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that State.
>
> "What this court said about the Minnesota statute can have no application to the present case unless it be made to appear that the Constitution and laws of California invest the municipal authorities of that State with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the Constitution of the State. We are not at liberty so to interpret that instrument."

The court then referred to the provisions of the Constitution and laws of California giving the water company an opportunity to be heard before the rates were fixed, and quoted from the case of Spring Valley Water Works v. San Francisco, 82 Cal. 286, as follows:

> "When the Constitution provides for the fixing of rates or compensation, it means reasonable rates

and just compensation. To fix such rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts can not, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

The ordinance involved in the case of San Diego Land & Town Co. v. National City, expressly provided that no person should receive water rates in the city except as established by the ordinance, thus showing clearly that it was not contemplated that so long as the municipal authorities kept within their jurisdiction there should be any judicial hearing as to the reasonableness of the rates, but notwithstanding that fact the court said that the only inquiry for the court was whether or not the rates were so low as to deprive the company of its property without compensation, the company having had opportunity to be heard before the rates were fixed.

As the statute we are considering provides for notice and hearing, and such notice and hearing were had before the rates complained of were fixed, the case of Chicago, etc., R'y Co. v. Minnesota, is no more applicable here than it was in San Diego Land & Town Co. v. National City, and interpreting that case as the court

has done the argument of counsel for complainant falls to the ground.

The case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, involved the validity of city ordinances fixing telephone rates. In an opinion by Mr. Justice Moody, the court said:

> "The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the Section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function, and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings, and, for peculiar reasons, in some forms of taxation (citing case) would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council, by Section 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that, if charges were fixed in that manner, the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. (Citing case.) Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the States, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether

such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case."

The statute contemplates that as long as the Commission keeps within its power there shall be no judicial inquiry as to the reasonableness of the rates which it may fix. When, however, the Commission fixes rates which are so low that they amount to confiscation it exceeds its power, and its action is void. Neither the Legislature nor a Commission pursuant to its authority has any power to go beyond the limits of regulation into the territory of confiscation, and when the Commission does that, it is beyond its power. The statute does not contemplate that if the Commission should go that far there should be no judicial inquiry as to its acts. Until the State courts have refused to grant a hearing as to the validity of the orders of the Commission it must be presumed that they would do so if a proper case should be presented to them. Of course, that presumption would not preclude this court from making an inquiry as to whether or not the rates are confiscatory if it were called upon to do so, but the carrier has not asked the court to make that inquiry in this case. What the carrier does ask the court to do is to hold that the State by the statute in question has cut off that inquiry. For the Commission we insist that such an inquiry can not be cut off by the mere enactment of the statute, or by the action of the Commission under the statute, the presumption being, as this court has said, that the State courts are open for such an inquiry.

Just as any citizen has the right to question the constitutionality of a statute which injuriously affects him, although the statute does not expressly give him that right, so a carrier has the right, without any express provision in the statute giving him that right, to question a rate order of the Commission upon the ground that the Commission has exceeded its power, as by refusing to hear any evidence or by fixing a rate so low as to be confiscatory. It would hardly be contended that the statute is void because it does not expressly provide for a hearing in the courts as to whether or not the Commission arbitrarily refused to hear any evidence, and yet there seems to be no more reason why the statute should expressly provide for a hearing as to any other matter as to which the carrier is entitled to be heard than there is why it should expressly provide for a hearing as to that matter. Therefore, the failure of the McChord Act to expressly provide for a hearing as to the validity of the orders of the Commission does not render it unconstitutional. Even if the statute expressly provided that the carrier should never be heard as to whether or not the rates fixed by the Commission were so low as to deprive him of his property without due process of law that part of the statute would be held void and the remainder of the statute upheld, and certainly that which if expressed would be void can not be implied.

Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362.

But the railroad company says that even though the statute does not cut off a judicial hearing as to whether or not the rates are confiscatory it certainly does cut off a judicial hearing as to whether or not the rates are reasonable as between the carrier and the shipper. If, however, a right of appeal to the courts were given the action of the courts upon the appeal would be legislative merely, as held in Prentis v. Atlantic Coast Line Company, 211 U. S. 210, and as the railroads have no constitutional right to legislative action by the courts, they can not complain that no such right of appeal is given. Indeed, it seems that the power to hear such an appeal could not be conferred upon the Kentucky courts, as that would be to confer upon them legislative power.

Counsel for the railroad company insist, however, that the statute should have given a right of review by declaring the rates fixed by the Commission to be only *prima facie* reasonable, and that the statute could not otherwise be valid. It is true that under a statute declaring the rates fixed to be only *prima facie* reasonable the courts would not fix rates for the future, but would merely set aside rates fixed by the Commission, and yet the courts would pass upon the same question upon which the Commission passed, the only difference being that some weight would be given to the finding of the Commission. If the courts should not agree with the Commission the order of the Commission would be set aside, and nothing substituted therefor, however extortionate may have been the rates previously charged by the carrier. There must be power somewhere to fix

rates for the future which shall be the only legal rates subject only to the restriction that they shall not violate any right secured to the carrier by the Constitution, and as the fixing of the rates for the future is not a judicial function, the Legislature must have power to delegate that authority to the Commission. Whether the Commission shall have power to fix rates which shall be only *prima facie* reasonable, or power to fix rates which shall be conclusively reasonable, depends upon how much power the Kentucky Constitution authorizes the Legislature to confer upon the Commission. The Federal Constitution does not interpose any barrier to the making by the Legislature of rates which shall be the only legal rates, except the restriction that the rates shall not be so low as to take the carrier's property without compensation, and if the Legislature has the power to make rates subject only to that restriction the question as to whether or not it may delegate that power to the Commission must be answered by the Kentucky Constitution. We are now considering only the question whether or not the statute violates the Federal Constitution, and so we assume for the present that there is nothing in the Kentucky Constitution which condemns such a statute.

If perchance the court should conclude that the Legislature had no power to give finality to the rates fixed by the Commission the statute would then be void only to that extent, and the order of the Commission would be valid, but the rates only *prima facie* reasonable.

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, the enforcement of rates fixed by a Commission was enjoined because the carrier's earnings would be so diminished thereby that the carrier would not be able to pay one half the interest on its bonded debt above the operating expenses, but the court refused to enjoin the Commission from making other rates, and in answer to the objection that the statute authorizing the Commission to make rates was void because of excessive penalties and because it declared the rates made by the Commission to be conclusive, the court, by Mr. Justice Brewer, said (p. 395):

> "We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the Commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads."

In many of the cases in which the validity of rates fixed by a State Legislature or by a tribunal pursuant to legislative authority has been involved, the law in question has provided, in effect, that the rates fixed should be conclusively presumed to be reasonable, and yet in every one of those cases except the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, this court has in-

quired whether or not the rates were confiscatory, and has never held that the mere fact that the statute contemplated that the finding made by the Legislature or pursuant to its authority should be final, provided it was not confiscatory, was sufficient to render the statute unconstitutional. In the Minnesota case the Supreme Court of the State had precluded all judicial inquiry as to whether or not the rates were confiscatory, and this court was forced to hold that the statute as thus construed was void, there having been no hearing before the rates were fixed. In the case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, the court intimated very strongly, as we have already seen, that it is not even necessary that there should be any notice or hearing to give validity to rates fixed pursuant to legislative authority, and held that it must be presumed that the State courts would be open for the only judicial inquiry to which there is a constitutional right, and that is the inquiry as to whether or not the rates are confiscatory.

In *Ex parte* Young, 209 U. S. 123, the validity of rates fixed by a Commission as well as of rates fixed by the Legislature was involved, and it was assumed that the statute contemplated that the rates fixed by the Commission should be final and conclusive so long as they were not confiscatory, but the court held that the action of the Commission in fixing rates was void only in the event the rates fixed were confiscatory.

In Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, in which the court affirmed a decree of the

Supreme Court of North Dakota requiring the Northern Pacific Railway Company to put into effect specific rates on coal fixed by statute, the court, by Mr. Justice Holmes, said:

> "The carriage of coal is a very small part of the railroad's business. The estimate of the cost is admitted to be uncertain, and to depend in part upon arbitrary postulates. It has to be increased considerably above the average cost for freight in order to make out the plaintiff in error's point. We are far from saying that the argument for doing so does not seem to us to have considerable probability on its side. We do not say that experiment may not establish a case in the future that would require a decision upon the question of constitutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of Willcox v. Consolidated Gas Co., 212 U. S. 19, 23 L. Ed. 382, 29 Sup. Ct. Rep. 192, as nearly as may be, and affirm the decree, but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal."

The court there held not only that the only ground upon which the carrier could complain of rates on coal was that the rates were confiscatory, but that that question could be more satisfactorily determined after a practical test, and that test should always be required

where the penalties are not so excessive as to overwhelm the carrier.

The mere fact that it may be difficult for the carrier, where only a few rates are changed by law, to show that the new rates are confiscatory does not furnish any reason for applying a different rule in such cases. Minneapolis, etc., R'y Co. v. Minnesota, 186 U. S. 257, was a case of that kind, involving the validity of a reduction by the Minnesota Railroad Commission of rates on hard coal in carload lots. The court, by Mr. Justice Brown, said:

> "It was shown that coal belongs to one of the lowest classes of freight, and this is particularly true of the coal received from Duluth at Minneapolis, which was delivered at the Minneapolis & St. Louis Company upon their tracks at Minneapolis. Besides this, coal in carload lots was a comparatively insignificant item of the total freight carried, being but 2,583 tons for an entire year. True, it may be difficult to segregate hard coal in carload lots from all other species of freight, and determine the exact cost to the company; but upon the other hand, the Commission, in considering a proper reduction upon a certain class of freight, ought not to be embarrassed by any difficulties the companies may experience in proving that the rates are unreasonably low. The charges for the carriage of freight of different kinds are fixed at different rates according to their classification, and this difference, persumably at least, is gauged to some extent by a difference in the cost of transportation, as well as the form, size and value of the packages and the cost of handling them.
>
> "Notwithstanding the evidence of the defendant that, if the rates upon all merchandise were fixed at

> the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the Commission, may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots."

Again in the same case the court, referring to reductions made to meet competition, said:

> "While we never have decided that the Commission may compel such reductions, we do not think it beyond the power of the State Commission to reduce the freight upon a particular article, provided the companies are able to earn a profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

There seems to be no reason why the courts may not be required to give at least as great weight to the findings of a State Railroad Commission as to what are reasonable intrastate rates as they may be required to give to the findings of the Interstate Commerce Commission as to what are reasonable interstate rates, and it seems to be well settled that the findings of the Interstate Commerce Commission as to what are reasonable interstate rates can not be reviewed by the courts. It is only where the Commission has transcended its power, as by reducing a rate because of some supposed equity, and not because it is found to be unreasonable, that the courts will interfere. In other words, power to make the order, and not the mere expedience or wisdom of the order, is the question for the courts.

Interstate Commerce Com. v. Ill. Cent. R. Co., 215 U. S. 452.
Southern Pac. Co. v. Interstate Commerce Commission, 219 U. S. 433.

But it is said that the penalties are so excessive as to overwhelm the plaintiff in the event the statute should finally be held valid, and that the statute, therefore, in effect cuts off all judicial inquiry as to the validity of the statute. It is important, therefore, to determine just what the provisions of the statute as to penalties mean.

Those provisions are as follows:

> "And should said railroad company or corporation or any officer, agent or employe thereof, collect, charge or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars, nor more than two thousand dollars, and for a third and succeeding conviction, in any sum not less than two thousand dollars nor more than five thousand dollars."

It is clear that there can be but one "first offense" and but one penalty of one thousand dollars for that offense. Since Judge Evans held the statute to be void because of excessive penalties, the Court of Appeals of Kentucky has established a rule for the construction of

such statutes under which the penalties would be moderate and reasonable.

In Wilson v. Commonwealth, 26 Ky. Law Reporter, 685, the court held that under a statute prescribing a penalty for practicing dentistry without license, all acts in violation of the statute, prior to the institution of the prosecution, constituted but a single offense.

Commonwealth v. Standard Oil Co., 120 Ky. 724, which was a prosecution for selling oil without license, is to the same effect.

It is also well settled that the second conviction for which an increased penalty is prescribed means a conviction for an offense committed after the first conviction. Brown v. Commonwealth, 100 Ky. 127.

Such a construction of the statute is altogether reasonable, and any other construction would be a strained one. The court certainly will not resort to a construction which would render the provisions as to penalties void if any other construction can be adopted which is at all reasonable, as it is not to be presumed that the Legislature desired to prevent the carriers from testing the validity of the statute, or desired to oppress them. But it is said that every officer or agent of the carrier who violates the order of the Commission is subject to the penalty, and that this makes the penalties excessive, even though they be not cumulative. In determining, however, whether the penalties are excessive the order as to each rate must be considered a separate order, and the number of officers or agents responsible for charging more than the rate prescribed is necessarily limited.

The fact that the Commission makes many orders at one time, and that the aggregate of the penalties for violating all the orders may be great is immaterial. It must also be remembered that no indictments can be found except upon the recommendation of the Railroad Commission, and there is no reason to presume that the Railroad Commission would overwhelm the plaintiff with prosecutions even if it had the authority to do so under the statute.

In Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, at page 394, the court, by Mr. Justice Brewer, said:

> "The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the Commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the Commission.
>
> "It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the Legislature of any State or a Commission appointed under the authority of any

> State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal Courts, sitting as courts of equity."

The reasoning of this court in McCherd v. Louisville & Nashville Railroad Co., 183 U. S. 483, shows quite clearly that the court either considered the penalties not cumulative or conclusively presumed that the Railroad Commission, having full control of prosecutions under the statute, would not seek to destroy the carriers of the State. As no indictments could be returned until an order of the Commission fixing rates should take effect, the court in considering whether or not indictments could be returned without the recommendation of the Commission, was evidently assuming that an order of the Commission might become effective before there would be sufficient opportunity to apply for an injunction, for if the injunction was to be applied for before the order became effective it was quite immaterial whether or not the recommendation of the Commission was necessary to an indictment, it being sufficient in that event to apply merely for an injunction requiring the Commission to suspend or revoke its order before it should take effect, as has been done in this case, ten days being allowed after the entry of the order before it takes effect. The court manifestly thought that the carrier

ought not to be required, in order to protect himself, to proceed within that brief period, or assumed that no injunction could be granted until the order of the Commission should take effect, and, therefore, considered whether or not the carrier could, after the order of the Commission might become effective, have an injunction which would afford him as complete protection as an injunction granted before any action had been taken by the Commission. The court must have known, however, that if the penalties were cumulative, an injunction, after the order became effective, merely restraining the Commission from recommending indictments would not afford adequate protection to the carrier, as the penalties would go on piling up, notwithstanding such an injunction, and so the conclusion follows that the court was of opinion that the penalties were not cumulative, or presumed that the Commission would not seek to oppress or destroy the carriers. That case, therefore, seems a conclusive answer to the argument that the statute is void because of excessive penalties.

Counsel for plaintiff rely upon *Ex parte* Young, 209 U. S. 123, in support of their contention that excessive penalties render the statute void, but aside from the fact that the penalties prescribed by the statute here involved are not excessive, the court in that case very carefully confined the rule there declared to cases in which the rates had been fixed without a hearing. The court said:

> "Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject

over which the jurisdiction of the Legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state) and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing ever having been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the Legislature is complete in any event."

The court there uses the expressions "without a hearing" and "no prior hearing having ever been given," and the repetition of the thought shows that the words quoted were not used without due consideration. The court could not have meant that the doctrine announced was restricted to cases in which there had been no prior judicial hearing, for no one would contend that the carrier would be entitled to a second judicial hearing, and the court would not have been so careful to guard against

an interpretation of its opinion for which it would have been absurd to contend. Besides, the court expressly confines the doctrine to the case of the "establishment" of rates without a hearing, and the establishment of rates is a legislative act, and not a judicial act, even though the rates are fixed by a court, as was held in Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

The court also limited the doctrine of the case to penalties imposed for the purpose of preventing, or penalties tending to prevent, any inquiry as to whether or not the rates imposed are confiscatory. In the absence of any allegation by plaintiff that the rates fixed by the Commission are confiscatory, the doctrine of the Young case has no application. So far as appears from the bill the rates of which plaintiff is complaining may yield it a very handsome return. If the rates be not confiscatory there is no reason whatever why the carrier should not obey the order as to all the rates except one until the validity of the order can be determined, the refusal to obey the order as to one rate being sufficient to test its validity.

While the court in the Young case cited the opinion of Judge Evans in Louisville & Nashville R. Co. v. McChord, 103 Fed. 216, in support of the doctrine that the penalties in such a statute may be so excessive as to be void, the court, of course, did not mean to say that Judge Evans had properly applied the doctrine, as it could not do so without giving the case cited the same consideration which it gave the case which it was deciding, and no

court can be presumed to have given that consideration to every case cited in its opinion.

But even conceding that the doctrine of the Young case applies, only the provisions as to penalties are void, and the remainder of the statute stands. It was so held not only in the Young case, but in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and in the late case of Willcox v. Consolidated Gas Co., 212 U. S. 19.

In Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, in which the court held Section 816 of Kentucky Statutes to be void to the extent that it in conjunction with Section 819, prescribing penalties for its violation, created a criminal offense, the court manifestly intended to leave the statute in force to the extent that it merely prohibited the charging of more than a reasonable rate. In that case the court said:

> "Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury."

It seems clear, therefore, that the provision for penalties might be eliminated from the McChord Act and the remainder of the statute upheld. It is not a case where one part of the statute can be regarded as compensation for the other so as to authorize the conclusion that the part which would remain would not have been enacted without the part stricken out. The statute was

intended to protect shippers, and it would be unreasonable to say that they can not have the benefit of the statute because one of the provisions inserted to insure its enforcement has failed.

The court can not, therefore, enjoin the Commission from putting its order into effect, and it can not enjoin the Commission from recommending indictments for the reason that two of the three defendants have filed affidavits stating that they have never threatened to recommend indictments or to institute prosecutions, and that it is their purpose to test the validity of the statute in the civil courts. It is not made the duty of the Commission to recommend indictments for extortion, but it is merely provided by Section 819 that such indictments shall be returned only upon their recommendation. Section 820 of Kentucky Statutes does provide that it shall be the duty of the Commission to use proper efforts to see that the carriers are indicted and prosecuted for violations of that section, which puts into effect the long and short haul clause of the Constitution, and the difference in the two sections is significant. Section 821, it is true, makes it the duty of the Commission to see that all laws relating to railroads are faithfully executed, but no duty rests upon the Commission to do this by means of criminal prosecution if it can be accomplished in some other way. It is entirely proper that defendants should not resort to criminal prosecution until civil remedies have been exhausted, and surely complainant can not by falsely alleging that defendants are threatening criminal prosecutions preclude defendants from showing the contrary.

If the court holds that the provisions as to penalties, if cumulative, are void, there can be no reason for enjoining the Commission from recommending indictments in view of the denial of defendants that they have ever threatened to recommend indictments, or intend to do so until civil remedies have been exhausted, for if the court holds that the provisions as to penalties are either void or not cumulative the complainant would be in no danger of any accumulation of penalties if some future Commission should recommend indictments.

The plaintiff has alleged that it does not intend to obey the orders of the Commission until compelled to do so, and so there will be full opportunity to test the validity of the law in the civil courts, as it must be presumed that the shippers who may be injured by the violation of the Commission's orders will seek redress.

Besides, Section 821 of Kentucky Statutes makes it the duty of the Railroad Commission to see that all laws relating to railroads are faithfully executed, and the Commission would have power to institute an action in the name of the Commonwealth to compel the carrier to obey the order of the Commission as was done in the case of Commonwealth v. Louisville & Nashville R. Co., 120 Ky. 91, as to an order of the Commission requiring the Louisville & Nashville Railroad Company to operate trains on one of its branches. But if such an action would not lie the Commission would have power to make an award under Section 829 of Kentucky Statutes, which the court in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, found to be still in force, and appli-

cable to the offense of extortion created by the McChord Act, and would also have power to institute proceedings in court to enforce that award. And even though Section 829 might not be regarded as specifically applying to the McChord Act the Commission under its general powers could make an award and proceed to have it enforced in the courts.

It is contended that the act is void, because it applies to railroad carriers alone, and not to other carriers, and thus deprives railroad carriers of the equal protection of the laws. To this objection the case of Stone v. Farmers Loan & Trust Co., 116 U. S. 307, is a complete answer. In that case the court, by Mr. Chief Justice Waite, said:

> "General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the State of its property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws."

Another objection which Judge Evans found to the statute was that it authorizes the reduction of a rate upon complaint, and thus discriminates against companies against which complaints are filed. It is certainly not unreasonable to presume that rates of which no complaint is made by shippers are reasonable. The circumstances and conditions under which shipments are made on different roads are never exactly the same, nor are

the circumstances and conditions the same even as between different points on the same road, and so there can be no doubt that to authorize the Commission to reduce rates upon complaint is not a discrimination. If that were not true a Commission would have to investigate all rates or none, which can not be the law. It is manifest that the court had no thought when it decided in Siler v. Louisville & Nashville R. Co., 213 U. S. 175, that the Commission had no power to make a schedule of rates that such a construction of the statute would of itself render the statute void. In fact the court said:

> "The difference between the fixing of one rate or a few, upon specific complaint or information, and the adoption of a general scheme of rates, applicable in all cases to all the roads, is vast and important. In the one case it can be fairly accomplished, while, in the other, the chances of injustice and great inequalities are infinite and almost certain to occur."

In Southern Railway Co. v. Bartine, 170 Fed. 725, District Judge Farrington held that a statute authorizing the reduction of a rate upon complaint was not objectionable as discriminating against companies against which complaints were filed.

The statute we are considering here, however, authorizes the Commission to institute an investigation upon any information it may have that extortionate rates are being charged, and so the Commission is not restricted to the reduction of rates upon complaint.

But it is argued that the act is void for the further reason that it confers upon the Railroad Commission leg-

islative, executive, and judicial powers, and is, therefore, an abandonment of a republican form of government. This contention is fully met by the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210. The court there said:

> "We shall assume that when, as here, a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned."

The case of Trustees of Saratoga Springs v. Saratoga Gas, Electric Light and Power Company, 191 N. Y. 123 (18 L. R. A., N. S. 713), is an interesting and instructive case to the same effect.

This court has so repeatedly upheld statutes conferring upon administrative boards the power to fix rates that it is no longer open to question that such statutes do not violate the Federal Constitution, merely because they delegate legislative power to an administrative board. It is equally clear that the mere fact that the Commission is authorized to perform a judicial act does not bring the statute in conflict with the Federal Constitution. In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the court held that the power conferred by Section 218 of the Kentucky Constitution upon the Kentucky Railroad Commission to hear and finally determine the question as to whether or not a common carrier should be exonerated from the operation of the long and short haul law was not in violation of the Federal Constitution. That power is quite as clearly a judicial power as the power given to the Railroad Commission to determine

whether or not a carrier has charged more than a reasonable rate. In each case the Commission may perform a judicial act, but it does not perform a judicial function. The assessment of property is a judicial act, as has been often held, but it is not a judicial function. Before the Commission can perform the legislative act of fixing a rate for the future it must determine that the carrier is already charging more than a reasonable rate, but the carrier can not complain that the power of the Commission is thus limited. The judicial act is merely incidental to the legislative act, and is only such an act as the Legislature itself performs in determining whether or not particular legislation ought to be enacted.

In Prentis v. Atlantic Coast Line Co., 211 U. S. 210, the court, by Mr. Justice Holmes, said:

> "The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

To the same effect is the case of Southern Railway Co. v. Bartine, 170 Fed. 725.

The Commission does not act as judge in the matter as to which it legislates, as it does not finally determine whether or not its order fixing a rate for the future has been violated.

The finding that the carrier has been "guilty of extortion" which the Commission is required to make be-

fore it can fix a rate for the future is not a finding of criminal guilt, but merely a finding that the carrier has been charging more than a just and reasonable rate, as there is no criminal offense until the Commission has fixed a maximum rate, and that rate has been exceeded by the carrier. As said by the lower court, Mr. Justice Peckham, in Siler v. Louisville & Nashville R. Co., 213 U. S. 175, did not seem to observe any vice in the use of the word "extortion." In that case he said:

> "The statute, it will be remembered, gives no power to the Commission to fix rates, unless it has already determined that the rates complained of, or which it has investigated upon its own information, are extortionate, after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate, there can be no fixing of rates in that particular."

It is also clear that the statute does not violate the Kentucky Constitution. As said by the court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the Railroad Commission is a constitutional body, and by Section 218 of the Kentucky Constitution judicial power is conferred upon that body. It was also provided by the Constitution that the powers of the Commission should be fixed by law, but that its powers should continue as they then were until changed by the Legislature. At the time of the adoption of the present Constitution of Kentucky it was not unusual to confer upon Railroad Commissions the power to make rates, and when the Constitutional Convention, instead of conferring that power upon the Commission, left the Legislature free to confer upon the Commission

such powers as it might, in its wisdom, think best, there can be no doubt that the intention was to authorize the Legislature to confer the rate-making power upon the Commission. This is conclusively shown by the debates. The issue before the convention was whether the power to fix rates should be conferred upon the Commission by the Constitution or whether the Legislature should be left free to confer the power or not as might seem wise in future, and it was assumed by all the members who spoke upon the subject that there was nothing in the Constitution which would deny that power to the Legislature. (Debates, Vol. 4, pp. 5038-5050). The argument in opposition to the proposal that the powers of the Commission, including the power to make rates, be fixed by the Constitution was that the powers of the Commission should be flexible so that they might be adapted to varying circumstances and conditions, of which the Legislature should be the judge.

In Pennington v. Woolfolk, 79 Ky. 13, the Court of Appeals of Kentucky held that it was competent for the Legislature to confer upon the county courts functions which were not judicial for the reason that it had long been the custom to confer such functions upon those courts, and that it must be presumed for that reason that the framers of the Constitution intended to except those courts from the operation of that section of the Constitution providing for the separation of the different departments of government.

At the time the present Constitution was adopted the Railroad Commission had the power to award reparation

to shippers which it now has, and prior to that time it had had authority to make such an award with the force and effect of a judgment. (Gen. Stats., Ed. 1888, p. 1028.) Certainly these provisions in connection with Section 218 of the Constitution conferring upon the Commission powers of a judicial nature show that the framers of the Constitution intended to except the Railroad Commission from the operation of Section 28 of the Constitution, if to confer upon that body such powers as the statute confers upon it might otherwise be regarded as a violation of that section, which, referring to the three departments of government recognized by Section 27, reads as follows: "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Court of Appeals of Kentucky has shown that it is disposed to construe liberally the provisions of the Kentucky Constitution and statutes relating to the Railroad Commission in order to give that body as large powers in the regulation of the railroads of the State as is possible under the Federal Constitution.

In Commonwealth v. Louisville & Nashville R. Co., 120 Ky. 91, in which the court enforced an order of the Commission requiring the operation of trains on one of its branches, the court, by Judge Settle, said:

> "The power to regulate the relative rights and duties of the railroads and the public in this State has, in large measures, been delegated by the Legislature to the Railroad Commission, and the pro-

visions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore the recommendation made by them should have been obeyed by the railroad companies, but they having failed to do so, appellant could but resort to the courts for relief."

In that case counsel for defendant earnestly argued that the Commission had no power to make the order there sought to be enforced, but the court held that while the power was not expressly conferred by the statute it existed by virtue of the general power of the Commission to see that the laws relating to railroads were enforced.

In Louisville & Nashville R. Co. v. Commonwealth, 106 Ky. 633, the judgment in which was affirmed by this court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, the court refused to give to Section 218 of the Kentucky Constitution (the long and short haul section) the same construction which had been given by this court to a like provision of the Interstate Commerce Act, but held that the Commission and not the courts must determine whether or not the existence at the long haul point of competition which did not exist at the short haul point was sufficient to entitle the carrier to charge more for the short haul than the long haul, and then held that the provision as thus construed did not violate the Constitution of the United States. The court, by Judge Hobson, said:

"If the railroad companies are not to be allowed to have exclusive control over the rates for the long and short haul and the sole right to determine when competition exists, and to what extent special rates for this reason may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood self-interests have warped and controlled human judgment. However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve, and no principle of constitutional law is violated when the State, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others."

The Kentucky court having given that broad construction to the Constitution it follows that it would hold that the framers of the Constitution in giving the Legislature authority to determine what additional powers the Commission should have did not intend to deny to the Legislature the right to confer upon the Commission any powers of the same general nature.

Another objection urged to the statute is that it makes the Commission both judge and prosecutor by reason of the fact that the Commission after judicially determining that the carrier has been guilty of extortion as a basis of its legislative action then recommends indictments for violations of the law it makes. The Commission does not, however, act as judge in the trial of the prosecutions which it recommends. By Section 218 of the Constitution the Commission is empowered to determine whether

or not a carrier shall be relieved from the operation of the long and short haul law, and by Section 820 of Kentucky Statutes, the Commission has the power to determine whether or not the carrier shall be presecuted for violating that law. The situation as to that matter, therefore, is just the same that it is as to the offense of extortion, and yet the court in Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, upheld those provisions. The carrier can not complain that no indictment can be returned except upon the recommendation of the Commission as that provision is in the interest of the carrier. The recommendation of the Commission is not conclusive. The chances, therefore, that indictments will be returned are less than they would be in the absence of such a provision. The provision that no indictment shall be returned except upon the recommendation of the Commission was approved in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483.

II.

Rate Order Not in Exess of Power of Commission.

If the statute be valid the question then arises whether or not the rate order of the Commission was within its power. Of course the Commission had no power to violate any right secured to the carrier by the Constitution, but the bill does not allege that the order violates any such right unless the allegation that the order violates the carrier's inherent right to charge "just and reasonable rates" be such an allegation. It is not al-

leged that the orders of the Commission deprive the carrier of its property without due process of law because the rates fixed by the Commission are unreasonably low, but the allegation is that the Commission by reducing rates which were just and reasonable deprived the carrier of its property without due process of law. There is no *direct* allegation that the rates fixed by the Commission are unreasonably low, the only allegation to that effect being found in the statement that the carrier will be restricted to the rates fixed by the Commission, and "although the same are unreasonably low and unjust the complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates."

Just how low the rates fixed by the Commission must be before the court can say that the carrier's rights under the Constitution have been invaded is immaterial here. We think we have clearly shown that the rates must be so low as to be confiscatory before the carrier can be said to be deprived of his property without due process of law, but even if that be not the test the carrier surely must, in order to have relief, allege something more than that the rates fixed are unreasonably low and unjust, for that raises only the question upon which the Commission passed, and if the court should merely determine what would be a reasonable rate for the future it would exercise legislative power. The rates fixed by the Commission might seem to the court to be unreasonably low, but the question might be such a close one that the court would be unwilling to say that the finding of the Com-

mission was so far wrong as to indicate that the Commission was unreasonable. But even if the court passes upon the same question upon which the Commission passed, the rates fixed by the Commission must still be regarded as *prima facie* reasonable, and facts and not mere legal conclusions must be alleged to overcome the presumption in favor of the rates fixed by the Commission. In the case at bar no facts are alleged in the bill to show either that the action of the Commission was unreasonable or that the rates fixed are unreasonably low, and not even an allegation of a legal conclusion that the action of the Commission was unreasonable, the only allegation as to that matter being that "although" the rates fixed by the order complained of are unreasonably low the carrier can not exceed those rates if the order of the Commission goes into effect.

While it is not so alleged in the bill it is argued that the jurisdiction of the Commission depended upon the existence of the fact that the carrier was charging extortionate rates, and that if that fact did not exist the order was void. The fact is, however, that the statute authorizes the Commission to make rates for the future whenever it finds that the carrier has been guilty of extortion, and so it is that finding of the Commission which gives it jurisdiction, whether the finding be correct or not. Counsel argue in effect that even though the court may not have power to inquire whether or not the rates fixed by the Commission are reasonable so long as they are not confiscatory, the court may still inquire whether or not the Commission erred in determining that some change in the

rates fixed by the carrier was proper. In other words, the argument is that even though there may be no inquiry as to the fairness and wisdom of the particular law made by the Commission there may be an inquiry as to whether or not the Commission erred in determining that some law on the subject was necessary. There is as much reason why the finding of the Commission that some law upon the suject as to which it legislates pursuant to legislative authority is proper or necessary should be binding upon the courts as there is that a similar finding of the Legislature should be binding, and there is no reason to suppose that the Legislature did not mean what it said when it provided that the mere finding of the Commission that the carrier had been guilty of extortion should be sufficient to give power to fix a rate for the future regardless of the correctness of that finding.

Even if the existence of the fact, and not merely the finding of the Commission, that the rates charged by the carrier were extortionate was necessary to give the Commission power to fix rates for the future, no facts are alleged in the bill which show that the finding of the Commission that the rates charged were extortionate was erroneous. On the contrary, the fact that the carrier had for many years prior to March, 1910, charged much lower rates than those they were charging at the time of the hearing before the Commission made it incumbent upon the carrier to give a good reason for the change, and it does not appear from its bill that it made any attempt to do so.

Interstate Commerce Commission v. Chicago, etc., R. Co., 209 U. S. 108, 119.
Memphis Cotton Oil Co. v. Illinois Central R. Co., 17 I. C. C. R. 313.

The fact that the lower rates charged prior to March, 1910, were given to distillers alone while the rates fixed by the Commission apply to all shippers is immaterial in the absence of any showing in the bill that any persons other than distillers at the points involved shipped or received the commodities to which those rates applied.

It can not be said that the Commission exceeded its powers by acting arbitrarily or in bad faith, as there is no allegation to that effect. The mere allegation that the evidence heard bore no "proper relation" to the question investigated is but a conclusion of law, and even if its truth should be established that fact would not invalidate the action of the Commission if that body in good faith believed that the evidence did show that the rates ought to be reduced. Besides, the case was heard by the Commission upon written pleadings and some of the material facts were admitted by the carrier. Especially is this true as to the amounts for which reparation was awarded. There may also have been some room for difference of opinion as to the strength of the presumption arising from the fact that the carrier had long maintained lower rates than those being then charged, but that was a question for the Commission alone provided it acted in good faith.

It is insisted further that the Commission went beyond its power in making the order complained of, be-

cause discrimination against other Kentucky points will result if the order is obeyed. It is a complete answer to this proposition to say that the Court of Appeals of Kentucky has held Section 818 of Kentucky Statutes, which is the only statute in Kentucky prohibiting discrimination as between localities, to be void as to the penalties because of uncertainty. (Commonwealth v. Louisville & Nashville R. Co., 20 Ky. Law Rep. 491). Section 817 prohibits a difference in rates only where "like services" are rendered for two persons, and of course the circumstances and conditions of the service rendered in transporting goods between two points are never the same as the circumstances and conditions of the service rendered in transporting the same kind of goods between two other points. For that reason Section 817 does not prohibit discrimination in transportation rates as between localities, that kind of discrimination being prohibited by Section 818. But even assuming that Section 817 does prohibit discrimination as between localities a discrimination resulting from the action of the Commission would not be within the statute. The complainant, therefore, can safely await the further action of the Commission before it changes other rates. If, however, a change in other rates be necessary to avoid discrimination that does not condemn the order, even though a penalty attaches to the failure to make the change. If the mere fact that a change in one rate may necessitate changes in other rates is to prevent the Commission from acting, the only way in which a Railroad Commission can make rates is

to make complete schedules of rates, and to that method of making rates the carrier has very strenuously objected.

The Commission has full power to revoke or modify its orders making rates, and it must be presumed that as other complaints are presented it will so adjust rates as to prevent discrimination as far as it is possible to do so.

Another objection urged to the order of the Commission is that rates will have to be changed to intermediate points to avoid a violation of the long and short haul law. If there are intermediate points to which complainant has been charging higher rates than those fixed for the longer distance points, the Commission has full power under Section 218 of the Constitution to relieve complainant from the operation of the long and short haul law, and it must be presumed that it would do so upon complainant's application if any reason should be shown why complainant should be relieved from its operation as to the points in question. If no such reason be shown the law conclusively presumes that if the rates fixed by the Commission are reasonable, higher rates charged by the carrier for lesser distances included within the greater, are unreasonable.

All of the objections which relate to the readjustment of rates which will become necessary if the order of the Commission is obeyed go to the expediency of the order and not to the power of the Commission, and are answered by what was said by the court in the case of Interstate Commerce Commission v. Ill. Cent. R. Co., 215 U. S. 452, in answer to similar objections made to an order of the Interstate Commerce Commission relating to

the distribution of coal cars. In that case the court, by the present Chief Justice, said:

> "The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a perference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is brought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character, which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in preformance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

Another answer to all objections made to the reasonableness of the rates is that complainant must first present all the facts bearing on the reasonableness of the

rates to the Railroad Commission before resorting to the Federal courts. The statute expressly provides that an order of the Commission fixing rates "may be revoked or modified by an order likewise entered of record." And if the facts alleged in the bill are sufficient to condemn the order of the Commission, the presumption is that if they were presented to that body it would give relief. The allegation of the bill is that the evidence heard by the Commission bore no "proper relation" to the reasonableness of the rates for transporting the supplies and commodities in question when to be used for distilling purposes, but complainant did introduce evidence before the Commission, and there is no allegation that any evidence it offered was rejected. So far as appears, therefore, it deliberately withheld from the Commission the facts it now alleges in its bill, and upon which it asks the court to say that it has been deprived of its property without due process of law. That being true, it can not now ask the court to make any inquiry as to the reasonableness of the rates, or as to the readjustment of rates made necessary by the action of the Commission. Here again the case of Prentis v. Atlantic Coast Line Co., 211 U. S. 210, is in point. There the court held that the carrier must, before resorting to the Federal courts, exhaust its remedies before the legislative bodies established by the State for the fixing of rates, and that, therefore, it must appeal to the Supreme Court of Appeals of Virginia from the order of the Commission, this court holding that the action of that

court upon such appeal would be legislative and not judicial action. The court, by Mr. Justice Holmes, said:

> "The State of Virginia has endeavored to impose the highest safeguard possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is intructed with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States."

It follows from that reasoning that the carrier can not deliberately withhold from the body established by the State to fix the rates all evidence bearing any "proper relation" to the reasonableness of the rates, or tending to show the effect of the order which the Commission is asked to make, and then ask relief upon any other ground than that the statute is void upon its face.

III.

Provision of Charter Fixing Maximum Rates Repealed.

It is conceded by complainant that it now has no irrepealable contract entitling it to charge the rates authorized by its charter, but counsel argue that it has a repealable contract, and that the obligation of that contract has been impaired by the action of the Railroad Commission in reducing complainant's rates when it

was not charging as much as it was authorized by its charter to charge, and when the provision of its charter giving it that authority has never been repealed.

In Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, the court, by the present Chief Justice, commenting upon a proposition similar to that urged here, said:

> "As it is not denied that the asserted charter rights was held subject to the power of the State to repeal, alter, or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 345, 53 L. Ed. 530, 542, 29 Sup. Ct. Rep. 370. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter or amend, and as it is impossible to assume that a legislative act has impaired a contract without, by the same token, declaring that such act has either repealed, altered, or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since, whatever be the extent of the right conferred, it was subject to the reserved power."

If the provisions of the charter as to rates could be repealed the only question for the court is whether or not they have been repealed.

Section 573 of Kentucky Statutes, which is a part of the chapter on "Corporations," under which railroad companies are incorporated, reads as follows:

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations, to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897; and if the officers, managers or agents of such corporation shall, after said date, exercise any powers, privileges or immunities repealed by this section or inconsistent with the provisions of this chapter, relating to similar corporations, or which could not be obtained under this chapter, the officer, manager or agent, so offending, and the corporation for which he acts, shall each be guilty of a misdemeanor, and fined for each offense not less than one hundred nor more than one thousand dollars, and upon the conviction of the corporation, the trial jury may, at their discretion, direct the forfeiture of its charter or articles of incorporation, in which case the court shall so adjudge. After the twenty-eighth day of September, 1897, the provisions of this chapter shall apply to all corporations created or organized under the laws of this State, if said provisions would be applicable to them if organized under this chapter."

That chapter (Secs. 763-771), defines the powers of railroad corporations and prohibits such corporations from charging more than just and reasonable rates (Section 816), and that chapter also now embraces the McChord Act as Section 820a, which formed a part of that chapter in the 1903 edition of Carroll's Statutes adopted by the Legislature. (Kentucky Statutes, Ed. 1909, Section 2290b.)

Under Section 573, the test as to whether or not the privileges granted by the charter of any railroad corporation have been repealed is the right of any railroad corporation now incorporated to obtain such privileges. The manifest purpose of Section 573 was to place all corporations on an equal footing as to their privileges and immunities, and the complainant having accepted the provisions of the present Constitution as authorized by Section 190 of that instrument, and also the provisions of the Kentucky Statutes relating to corporations, all its special privileges and immunities which it could not acquire if it were now being organized under the existing corporation law stood repealed on September 28, 1897. That no railroad corporation could now acquire the right to charge the maximum rates fixed in complainant's charter is too plain for argument, especially, in view of Section 816 of Kentucky Statutes, prohibiting extortion, and of the McChord Act authorizing the Railroad Commission to fix rates. Even if those statutes did not *ipso facto* repeal the provisions of complainant's charter as to rates, the action of the Commission in fixing rates for complainant pursuant to those statutes operates as such a repeal. The case of Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, holding that complainant could not be regarded as guilty of extortion as long as it kept within the maximum rates permitted by its charter, was decided in 1896, more than a year prior to the time fixed for the repeal of existing charter privileges which could not be acquired under existing laws, and long prior to the time at which complainant accepted the

provisions of the present Constitution and the provisions of the corporation law.

But the argument is that no repealing statute has been passed since complainant accepted the provisions of the new Constitution, and that complainant is not bound by any repealing statute enacted prior to that time.

Section 190 of the Constitution reads as follows:

> "No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

It is manifest that the words "future legislation" were used with reference to the phrase, "the time of the adoption of the Constitution" just preceding them, and the section must mean that any corporation accepting the provisions of the Constitution becomes subject to all legislation enacted after the adoption of the Constitution. Besides, the complainant expressly alleges in its bill that it did accept the existing act regulating corporations, and that was done, no doubt, to obtain the benefit of certain provisions therein.

In Newport and Cincinnati Bridge Co. v. Gill, 21 Ky. Law Rep. 942, the court held that a corporation created prior to the present Constitution could not have the benefit of legislation under that Constitution relating to the condemnation of property without accepting the provisions of that instrument, and clearly assumed that the acceptance of the Constitution would give the corporation the benefit of all existing legislation, from which

it follows that any corporation accepting the present Constitution becomes subject to all existing legislation enacted thereunder, and not subject merely to such legislation as may be enacted after such acceptance.

It would be anomalous if a corporation could escape the burden of adverse legislation by delaying until after its enactment to accept the provisions of the Constitution, and then obtain the benefit of favorable legislation by accepting the Constitution in anticipation of the enactment of such legislation.

Counsel argue, however, that the Court of Appeals of Kentucky has held that the provisions of complainant's charter requiring it to make farm crossings are still in force, and that if it must bear the burdens imposed by its charter it is entitled to the privileges of its charter. But it was only the "powers, privileges or immunities" of corporations which could not be acquired under existing laws which were to stand repealed, and not the burdens imposed. The court held in Louisville & Nashville R. Co. v. Robbins, 111 S. W. 283, that rights of way might have been donated in consideration of the provision of the charter requiring farm crossings, and that it could not, therefore, have been intended to relieve the corporation of such burdens imposed by its charter. Besides, there seems to be no reason why a railroad corporation organized under the existing law might not embrace in its charter a provision imposing upon itself such a burden if it should elect to do so.

Thus far we have assumed that the complainant up to the time it accepted the provisions of the present Consti-

tution had an irrepealable contract giving it the right to charge the maximum rates fixed in its charter, but that it did not have such a contract seems clear.

Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174.
Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, 517.
Winchester, etc., Turnpike Road Co. v. Croxton, 98 Ky. 739.

If the complainant did not have an irrepealable contract when the Constitution was adopted, then it became subject at once to all legislation enacted thereunder.

IV.

Order of Commission Not a Regulation of Interstate Commerce.

It is also contended that the order of the Commission, although it is expressly confined to specific intrastate rates, is a regulation of interstate commerce, for the reason that the rates to which it relates enter into and form a part of certain interstate rates set forth in a tariff filed with the Interstate Commerce Commission, and that a reduction of the intrastate rates will make it necessary to lower interstate rates. There is nothing in the bill to show that a reduction of the intrastate rates will necessitate a reduction of interstate rates. The rules of the Interstate Commerce Commission relating to the filing of intrastate tariffs are set out in the bill, and it is alleged that complainat's existing local rates in

Kentucky enter into and form part of its through rates set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910. It is further alleged that points on the north bank of the Ohio River have always had the benefit of the same rates to interior points in Kentucky that points immediately opposite on the south bank of the river have received to the same interior points, and that under the order complained of Louisville, on the south bank of the Ohio River, will have lower rates to interior points in Kentucky than New Albany and Jeffersonville, Indiana, immediately opposite on the north bank of the river, will have to the same points, and that Covington and Newport, Kentucky, on the south bank of the river, will have lower rates to interior points in Kentucky than Cincinnati, Ohio, immediately opposite on the north bank of the river, will have to the same interior points, and that discrimination will thus result against the points on the north bank of the river. It is also alleged that rates from the North through the Louisville and Cincinnati crossings to interior points in Kentucky are formed by adding to the rate to the Ohio River the rate south of the river, and that any change in the rate south of the river will necessitate a change of the through rate, if discrimination is to be avoided.

Assuming for the present that such discrimination will result unless the interstate rates are reduced the question arises as to whether or not that discrimination or a reduction of rates made to avoid such discrimination will result so directly from the order of the Ken-

tucky Railroad Commission as to make that order an unauthorized regulation of interstate commerce.

For the purpose of government regulation commerce is divided into three parts. Of one part the States have exclusive jurisdiction, of another part Congress has exclusive jurisdiction and of a third part the States have jurisdiction in the absence of regulation by Congress.

In Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, in an opinion by Mr. Justice Brown, the court held that the Kentucky Act of March 21, 1890, fixing rates of toll and fare over the bridge of the Cincinnati and Covington Bridge Company spanning the Ohio River, and connecting the States of Ohio and Kentucky, was an attempted regulation of interstate commerce which it was not within the power of the State to make. The court said:

> "The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of regulation by Congress; third, those in which the action of Congress is exclusive and the States can not interfere at all. The first class, including all that wherein the States have plenary power and Congress has no right to interfere, concerns the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is no remote that it can not be termed in any sense an interference."

That each State has exclusive jurisdiction to regulate the transportation of goods wholly within its borders has

been so often decided by this court that it is no longer an open question.

In Gibbons v. Ogden, 9 Wheaton 1, the court, by Mr. Chief Justice Marshall, said (194):

> "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

In The Daniel Ball v. United States, 10 Wall. 557, the court by Mr. Justice Field, said (564):

> "There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce 'among the several States, with foreign nations, and among the Indian tribes.' This limitation necessarily excludes from Federal control all commerce not thus designated and of course that commerce which is carried on entirely within the limits of the State, does not extend to or affect other States."

In Western Union Telegraph Co. v. Texas, 105 U. S. 460, the court, in an opinion by Mr. Chief Justice Waite, said:

> "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and

territory of a State, and does not affect other nations or States or Indian tribes, that is to say, the purely internal commerce of the State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the government of the United States from one place to another exclusively within its own jurisdiction will not be repugnant to the Constitution of the United States."

As to that part of commerce of which the State has exclusive jurisdiction its control is as full and complete as is the control of Congress over that part of commerce of which it has exclusive jurisdiction.

In Sands v. Manistee River Improvement Co., 123 U. S. 288, in which it was held that the State could improve its rivers and require persons engaged in interstate commerce to pay tolls for their use as thus improved, the court, by Mr. Justice Field, said:

> "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government."

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612, the court held that the State of Kansas had the power to compel a carrier by mandamus to perform a common law duty as to the transfer of cars loaded with interstate traffic, in the absence of any action by the

Interstate Commerce Commission. In an opinion by Mr. Justice Brewer, the court, after stating the facts, said:

> "The roads are, therefore, engaged in both interstate commerce and that within the State. In the former, they are subject to the regulation of Congress; in the latter, to that of the State; and to enforce the proper relation between Congress and the State, the full control of each over the commerce subject to its dominion must be preserved."

In Allen v. Pullman's Palace Car Co., 191 U. S. 171 (180), in which the court held that the Pullman Company could not complain of being taxed for the privilege of doing a local business which it was free to renounce, the court by Mr. Justice Day said:

> "It is not necessary to review the numerous cases in this court in which attempts by the States to control or regulate interstate commerce have been the subject of consideration. While they show a zealous care to preserve the exclusive right of Congress to regulate interstate traffic, the corresponding right of the State to tax and control the internal business of the State, although thereby foreign or interstate commerce may be indirectly affected, has been recognized with equal clearness."

The Employer's Liability Cases (Howard v. Ill. C. R. Co., 207 U. S. 463) illustrate the care with which this court has guarded the right of the States to control that commerce which is purely internal. In those cases the act of Congress regulating the liability of interstate carriers for injuries to their employes was held to be void because the act was not restricted to those employes who might

be engaged in interstate commerce at the time they were injured, the court holding that the States alone had the right to regulate the liability of interstate carriers for injuries to employes engaged in intrastate commerce alone at the time they were injured.

In New York, *ex rel.*, Pennsylvania R. Co. v. Knight, 192 U. S. 21 (26), the court held that the State of New York could impose a tax upon the cab service of the Pennsylvania Company in New York City, although that service was intended to promote the company's interstate business. After stating that the mere fact that a part of a carrier's business is interstate transportation does not relieve the carrier from State regulation, the court, by Mr. Justice Brewer, said:

> "So the Pennsylvania Company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service which is wholly performed within the State, and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States, a like separation may be recognized between the control of the State and that of the nation."

In County of Mobile v. Kimball, 102 U. S. 691, the court, after saying that "commerce among the States" strictly considered, consists in intercourse and traffic, said:

> "Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to

legislation upon subjects which are merely auxiliary to commerce."

While the power to regulate commerce embraces the power to regulate the mere auxiliaries of commerce, yet those things which are merely auxiliary to commerce are not commerce, although in defining "commerce" they are sometimes included in that term. Either the State or Congress has exclusive jurisdiction of commerce strictly considered. If the commerce is not wholly within one State, Congress has exclusive jurisdiction, but if it is wholly within one State it is within the exclusive jurisdiction of the State. As to those subjects which are merely auxiliary to interstate commerce the State has jurisdiction until Congress acts.

That we are dealing in the case at bar with a regulation of commerce strictly considered, and not with a regulation of a mere auxiliary of commerce, will hardly be disputed.

In Pabst Brewing Company v. Crenshaw, 198 U. S. 17 (30), the court stated with emphasis the rule that a State regulation does not violate the commerce clause if interstate commerce is only indirectly affected by the regulation. In that case the court upheld a statute of the State of Missouri imposing an inspection fee upon malt liquors shipped from other States into that State, and in answer to the objection that the statute was a regulation of interstate commerce the court, by the present Chief Justice, said:

"Conceding, it is argued, that the Missouri statute attached to the liquor after delivery at its destination in Missouri, nevertheless, as the burdens which the statute imposed were of such a character as to affect traffic in the article, and hence operated to deter shipments into Missouri, therefore the statute must be treated as if it bore upon the liquor while still in transit as a subject of interstate commerce. This proposition simply amounts to contending that the Wilson act should be disregarded, since to enforce it would give the States power to regulate interstate traffic in liquor. If, when a State has but exerted the power lawfully conferred upon it by the act of Congress, its action becomes void as an interference with interstate commerce because of the reflex or indirect influence arising from the exercise of the lawful authority, the result would be that a State might exert its power to control or regulate liquor; yet if it did so its action would amount to a regulation of commerce and be void. And this would be but to say at one and the same time that the power could and could not be exercised. But the proposition would have a much more serious result, since to uphold it would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious workings of our constitutional system has been made possible."

When it has once been determined that a certain part of commerce is within the exclusive jurisdiction of the State the validity of any regulation of that commerce by the State can not depend upon its effect upon interstate commerce. The effect upon interstate commerce of a regulation of purely internal commerce can not be other than indirect, and it is only that regulation which directly affects interstate commerce that is prohibited to the

States. The test is not the extent to which interstate commerce may be affected by the exercise of the power, but whether the effect results directly or results indirectly from the exercise of the power. The indirect effect upon interstate commerce which is not sufficient to invalidate a State regulation may sometimes be more serious or vital than the direct effect upon such commerce of some other State regulation which would be sufficient to invalidate that regulation. The extent to which interstate commerce is affected becomes important only where Congress has jurisdiction, and the question is whether or not the State in the exercise of its police power has trespassed upon that jurisdiction. If interstate commerce is not substantially burdened in such cases the power of the State is not taken away, although interstate commerce be directly affected. The State has power to make all proper regulations for the protection of the public, unless the power has been given to Congress, and so the inquiry is whether or not Congress has power over the subject, the State having the power if Congress has not. Congress has not jurisdiction over intrastate rates and therefore the State must have power to regulate those rates, without regard to the effect of such regulation upon interstate commerce. Whether or not Congress has power over the whole subject-matter can not depend upon the effect of the regulation made by the State, as that must be determined before the State acts. If it is determined that Congress has jurisdiction over the subject-matter then arises for the first time the question as to whether or not the State

has by its regulation substantially burdened interstate commerce. If it has not, the regulation is valid even though interstate commerce be directly affected, but interstate commerce must be directly affected before any question as to the extent of the burden can arise. The cases in which the validity of the State regulation has been made to depend upon the extent of the burden upon interstate commerce or upon the necessity for imposing the burden upon interstate commerce have usually been cases involving regulations affecting subjects merely auxiliary to commerce, or instruments or vehicles of commerce, a long list of such cases being given by Mr. Justice Brown, speaking for the court, in Cleveland, etc., R. Co. v. Illinois, 177 U. S. 514.

In Houston, etc., R. Co. v. Mayes, 201 U. S. 321, the court very clearly drew the distinction which we are here insisting upon. In that case the court, by Mr. Justice Brown, said:

> "As the power to build and operate railways, and to acquire land by condemnation, usually rests upon State authority, the Legislature may annex such conditions as they please with regard to intrastate transportation, and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

This court has repeatedly held that the regulation of rates for the transportation of goods wholly within a single State is a regulation of internal commerce; and that the fact that such regulation by the State affects interstate commerce does not render it invalid. In Stone

v. Farmers' Loan & Trust Co., 116 U. S. 307, the court, by Mr. Chief Justice Waite, referring to the State of Mississippi, said:

> "It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."

In Wabash, etc., Railroad Co. v. Illinois, 118 U. S. 557, the court, by Mr. Justice Miller, after stating that it was bound by the decision of the Supreme Court of Illinois holding that the long and short haul statute of that State applied to interstate transportation as well as intrastate transportation, said:

> "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it is certainly the province of the State Legislature to determine that question."

In Smyth v. Ames, 169 U. S. 446, the court, by Mr. Justice Harlan, at page 521, said:

> "It can not be doubted that the making of rates for transportation by railroad corporations along public highways between points wholly within the limits of a State is a subject primarily within the control of that State."

In Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503, at page 519, the court, by Mr. Justice Shiras, said:

> "It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a State."

The court, as it had previously done in Munn v. Illinois, 94 U. S. 113, there recognized the fact that the State in regulating the intrastate rates of carriers merely exercises a part of its police power, and that is made clearer still by the fact that the court cited the case of Louisville & Nashville R. Co. v. Kentucky, 161 U. S. 677, as a complete answer to the objection that the regulation of intrastate rates complained of was a regulation of interstate commerce, the court having held in the case cited that the State, in the exercise of its police power, had power to prohibit the consolidation of parallel and competing roads in the State although they formed parts of interstate lines.

In Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, the court held that the fact that the Supreme Court of North Dakota had construed a statute of that State fixing coal rates as applying only to transportation wholly within the borders of the State disposed of the objection that the statute was a regulation of interstate commerce.

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and also in Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, the court assumed that the State had power to make complete schedules of intrastate rates for interstate carriers, although the court must have taken judicial notice of the fact that the existing relation between interstate rates and intrastate rates would be violently disturbed by such a regulation, and yet it is manifest that the effect upon interstate commerce of such a regulation of rates must be much greater than that which would result from the few changes in rates made by the order of which appellant complains.

In Siler v. Louisville & Nashville R. Co., 213 U. S. 199, in which the validity of complete schedules of rates made by the Railroad Commission of Kentucky was involved the court in support of its conclusion that the statute did not confer power upon the Commission to make schedules of rates did not suggest that to give the Commission that power would necessarily give it power to regulate interstate commerce, and yet as the schedules involved in that case made a sweeping reduction of rates it is clear that they would have much more substantially burdened interstate commerce than would the reduction of rates on distillers' supplies to and from a few points.

In Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257, in which a regulation of coal rates from Duluth to interior points of Minnesota was involved, there was no suggestion that the State had trespassed upon the jurisdiction of Congress, and yet the effect upon interstate

rates of such a regulation must have been quite as great as that of the regulation of which the appellant is here complaining.

In determining what is withdrawn from State regulation by the commerce clause, leaving out of view that part of commerce of which the States have jurisdiction only until Congress acts, the subjects of legislation are divided into two classes. Interstate commerce, including all its auxiliaries, constitutes one class, and every thing that is not interstate commerce constitutes the other class. Intrastate transportation, therefore, does not constitute a separate class, but is classed with everything else that is not interstate commerce, and the State has as complete control of that branch of commerce as it has of every other subject of legislation that is purely internal.

If the State did not have exclusive jurisdiction of intrastate rates we would have a case where the State would at least have jurisdiction until Congress should act, as it is quite certain that Congress has not exclusive jurisdiction. It is only where its power is exclusive that the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction.

Leisy v. Hardin, 135 U. S. 100.
Wilkerson v. Rahrer, 140 U. S. 545.

And even as to some matters as to which the power of Congress when exercised is exclusive any action taken by the State must be respected until Congress intervenes.

In Missouri, etc., R. Co. v. Haber, 169 U. S. 613, involving the validity of a State regulation as to diseased cattle, the court, by Mr. Justice Harlan, said:

> "Although the power of Congress to regulate commerce among the States, and the power of the States to regulate their purely domestic affairs, are distinct powers, which in their application may at times bear upon the same subject, no collision that would disturb the harmony of the national and State governments, or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the State legislation may refer."

In the same case the court, after reviewing previous decisions, said:

> "These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes."

In Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, the court held that a statute of the State of Ohio requir-

ing each railroad company operating a railroad in the State to stop at least three trains each day at each station of over 3,000 inhabitants was not a regulation of interstate commerce as applied to the trains of a railroad company engaged in such commerce, although all the trains of the company might carry interstate passengers. In answer to the argument that such legislation does not come within the police power of the State, because it does not affect the public health, morals or safety, and that it is only in the exercise of the police power that legislation affecting interstate commerce may be enacted by the State, the court, by Mr. Justice Harlan, said:

> "It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general government."

The rates which a carrier must charge depends to a large extent upon his liability for losses occurring in the course of transportation, and yet the State may fix that liability as to interstate shipments in the absence of legislation by Congress as to that matter, as held in Pennsylvania R. Co. v. Hughes, 191 U. S. 477. In that case, the court by Mr. Justice Day, said (p. 488):

> "It is well settled that the State may make valid enactments in the exercise of its police power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

In Northern Securities Co. v. United States, 193 U. S. 197, the court merely held that Congress might prohibit State corporations from carrying out the purposes of a combination formed in restraint of interstate commerce. The court, by Mr. Justice Harlan, said (p. 350):

> "Whilst every instrumentality of domestic commerce is subject to State control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.*"

The italics were used by the court, and show that there is no room for conflict between the Federal government and a State government where a State regulation applies only to transportation within its borders, and the Congress has made no attempt to regulate such transportation, it matters not how much interstate commerce may be affected.

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612, already cited on another point, the court held that even though Congress has conferred power upon the Interstate Commerce Commission to regulate the transfer of cars loaded with interstate traffic the State could by mandamus compel a carrier to perform a common law duty as to such transfer, the Interstate Commerce Commission having made no regulation affecting the matter.

That Congress has disclaimed any intention to regulate intrastate rates seems clear.

In Missouri Pac. R'y Co. v. Larabee Flour Mills Co., *supra,* the court, after declaring that Congress and the State must each have full and complete control over that part of commerce subject to its dominion, said:

> "How the separateness of control is to be accomplished it is unnecessary to determine. Its existence is recognized in the 1st section of the interstate commerce Act of February 4, 1887 (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat. 1901, p. 3154), as well as in that of June 29, 1906 (34 Stat. at L. 584, Chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 893), for each provides:
>
> "'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country, from or to any State or territory, as aforesaid.'"

In Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415, the Interstate Commerce Commission, at p. 422, said:

"While we have full authority, upon certain principles and within certain limits definitely fixed in the amended act, to deal with interstate rates, it is expressly provided in Section 1:

" 'That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or territory as aforesaid:

" 'This language seems to have but one meaning, and that is that, although the Congress constitutionally may give and in fact has given to the national Commission authority to control and regulate the rates to be demanded and accepted by interstate carriers on interstate traffic, it has excluded us from the exercise of any such powers as to the purely State traffic of interstate carriers. Whatever authority may be vested in the courts for the redress of such wrongs, it seems reasonably clear that this Commission, under such circumstances as are disclosed on the record, may not lawfully interfere by an order the purpose of which is directly or indirectly to affect the rates imposed upon the defendant by the order of the Alabama Commission.' "

Although Congress, when that decision was rendered, was considering the amendment of June 18, 1910, to the Interstate Commerce Act, it amended Section 1 of that act without changing the language quoted by the Interstate Commerce Commission, thus again deliberately leaving to the States absolute control of intrastate rates, as we believe it was bound to do under the Constitution.

While Congress can neither delegate its own powers nor enlarge those of a State, yet it may adopt as its

own the law of a State provided the law be one which it would have been competent for it to enact.

Wilkerson v. Rahrer, 140 U. S. 545.

Therefore, the express declaration of Congress that the Interstate Commerce Act shall not apply to the transportation of property wholly within one State must be regarded as the adoption by Congress of any regulation of intrastate rates made by a State, if Congress had any power over the subject, which we deny. The States had long exercised the power to regulate intrastate rates, and Congress, if it had any control over such rates, could not have intended to leave them altogether unregulated merely because their regulation might affect interstate commerce.

In Smith v. Alabama, 124 U. S. 465, in which the court held that a statute of Alabama requiring locomotive engineers to be examined and licensed was not a regulation of interstate commerce, the court, by Mr. Justice Matthews, said:

> "The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which, until displaced, covers the subject."

But it is said that Congress has acted as to intrastate commerce to the extent of prohibiting any discrimination against interstate shipments in favor of intrastate shipments, and that the State regulation here complained

of requires the carrier to lower its interstate rates in order to avoid such discrimination. We deny that Congress either has the power to prohibit the granting of favors to intrastate shipments as against interstate shipments or has attempted to exercise that power.

In Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, the court held that the State could not prohibit a carrier from discriminating in favor of interstate shipments as between intrastate shipments and interstate shipments. For the same reason Congress has no power to prohibit a carrier from discriminating in favor of intrastate shipments as between intrastate shipments and interstate shipments. If the carrier elects to give free transportation of freight or passengers from one point to another in the same State that is a matter of which Congress can not complain. A carrier conducting both an interstate business and an intrastate business is to be regarded as two separate carriers so far as the government regulation of rates is concerned.

In Kehrer v. Stewart, 197 U. S. 60, a statute of the State of Georgia upholding a tax of $200 upon resident managing agents of non-resident packing houses was upheld, regardless of the fact that the greater portion of the business was interstate in character. The validity of the statute being made to depend upon whether or not the domestic business was a mere incident to the interstate business, the court, by Mr. Justice Brown, said:

> "There could be no doubt whatever that, if the agent carried on his interstate and domestic busi-

> ness in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment."

In determining whether or not intrastate rates are so low as to be confiscatory, revenues from interstate business are not to be considered, and in determining whether or not interstate rates are so low as to be confiscatory revenues from intrastate business are not to be considered.

Smyth v. Ames, 169 U. S. 466.

It follows, therefore, that a carrier can not recoup his losses on intrastate business by increasing interstate rates beyond what would otherwise be reasonable. If because of losses on intrastate business the carrier could maintain interstate rates which would otherwise be unreasonably high, it might plausibly be argued that Congress has power to prohibit discrimination in favor of intrastate traffic as against interstate traffic, but the fact is that interstate business and intrastate business are completely separated in determining whether or not intrastate rates are confiscatory, and that fact emphasizes the exclusive jurisdiction of the State over intrastate rates.

Where discrimination results from an undue difference in two rates, and both rates are under the control of the same government, the carrier may be required to remove the discrimination by either lowering the higher

rate or raising the lower rate, but where the one rate is under the control of the State and the other is under the control of Congress that can not be done. For the purposes of regulation the carrier is a separate and distinct person as to each rate and therefore neither the State nor Congress can require such an election. The interstate carrier and the intrastate carrier can not be required to elect whether one of them will raise a certain rate or the other will lower a certain other rate. Therefore, the remedy of the government controlling the higher rate must be to compel a reduction of that rate. In that way discrimination may be prevented although it may not be prohibited. If intrastate rates are too high intrastate shippers can not be protected unless the State has power to reduce those rates. It may be argued that the Interstate Commerce Commission and the Kentucky Railroad Commission may never agree as to the relation which interstate rates and intrastate rates ought to bear to each other, and that each time one of them requires a reduction of the rates which it controls the other will require a corresponding reduction in the rates it controls, thus pressing both intrastate rates and interstate rates down to a point where the carrier can not live. The Interstate Commerce Commission, however, does not accept the rates made by a State Commission as the absolute measure of fair interstate rates, and sometimes refuses to reduce interstate rates even though they may be too high as compared with the rates fixed by the State as maximum rates. But even if that were not true neither intrastate rates nor interstate

rates can be made so low that they will not yield the carrier a fair return.

Since Congress has complete control of interstate rates, it follows that it is not necessary for the protection of interstate shippers that Congress should have the power to prohibit discrimination as between interstate shipments and intrastate shipments, its power to require a reduction of interstate rates being all that is necessary for that purpose.

But even if Congress has power to prohibit discrimination in favor of intrastate commerce it has not attempted to exercise that power.

By Section 1 of the Act to Regulate Commerce it is expressly provided, as we have seen, that the provisions of that Act shall not apply to the transportation of property wholly within a single State.

Section 2 forbids discrimination in the transportation of persons or property "subject to the provisions of this Act."

Section 3 forbids any common carrier "subject to the provisions of the Act" to grant any undue or unreasonable preference to any person or locality or any particular description of traffic, which must mean, of course, any traffic subject to the provisions of the Act.

Section 4 declares that it shall be unlawful for any common carrier subject to the provisions of the Act "to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of the Act."

That language shows conclusively that Congress did

not intend to prohibit discrimination in favor of intrastate shipments as against interstate shipments, "the intermediate rates subject to the provisions of this Act" being only intermediate interstate rates.

Again, Section 1 prohibits the issuing of "interstate" free tickets or passes, thus showing the care of Congress not to attempt to prohibit favors to intrastate passengers or shippers.

But if it be conceded for the sake of the argument that Congress has power to prohibit carriers from granting to intrastate shippers favors which they do not grant to interstate shippers, and that it has exercised that power, it does not follow that the order of the Railroad Commission here complained of was beyond its jurisdiction. The State still has power to regulate intrastate rates subject to the limitation that its regulations shall not make it necessary for the carrier to discriminate against interstate shipments. A discrimination in rates may ordinarily be obviated either by raising the lower rate or lowering the higher rate. Where the State, however, has fixed the lower rate as the maximum, the discrimination can be obviated only by lowering the higher rate, and that being an interstate rate, the argument is that the fixing of the lower rate by the State is necessarily a regulation of interstate commerce because it necessitates the lowering of the higher interstate rate, if discrimination is to be avoided. Under the Act to regulate Commerce, however, the carrier is not subject to any penalty for discrimination until the Interstate Commerce Commission has determined

that a rate is discriminatory. The published interstate rate is the only legal rate until the Interstate Commerce Commission determines otherwise, and no action of the State can make that rate illegal.

Texas & Pac. R'y Co. v. Abilene Cotton Oil Co., 204 U. S. 426.

But it does not follow because the carrier is required to adhere to the rate he has published until it has been changed by the Interstate Commerce Commission that there is any presumption of law that the published rate is reasonable. There is simply no extortion or discrimination which may be punished until the Interstate Commerce Commission has acted. Therefore, it is for the Interstate Commerce Commission to say whether or not the interstate rate must be lowered. If a reduction of the interstate rate should be required it would be because of extortion and not because of discrimination, as the reduction of an intrastate rate in obedience to a State regulation could not be made the basis of a charge of discrimination. If the fact that a State regulation of intrastate rates brings about an undue disparity between interstate rates and intrastate rates deprives the State of the power to make the regulation, then the State can never regulate intrastate rates where both interstate rates and intrastate rates are too high, but at the same time bear the proper relation to each other, as any reduction of either must result in an undue disparity between them.

If interstate rates are lowered to avoid a discrimination prohibited by the Act of Congress it can

not be said that such a reduction of interstate rates results from the action of the State in compelling the carrier to reduce its local rates. Indeed, if Congress has left the regulation of intrastate rates to the State and then provided, as counsel claim, that interstate rates shall not be relatively higher than intrastate rates, it follows that Congress authorizes the application to interstate shipments of such intrastate rates as the State may prescribe, or at least adopts such rates as the standard of interstate rates. And, as we have already seen, Congress may adopt as its own any law or regulation of a State provided the law or regulation be one which it would have been competent for Congress to enact.

But even if Congress be not regarded as adopting State regulations any regulation by the State which tends to compel the carrier to lower its interstate rates is in aid of interstate commerce and not a burden upon that commerce so long as the carrier is not compelled to make its interstate rates so low as to be confiscatory. If every regulation which reduces a carrier's revenues is a burden upon the carrier it is not every regulation which thus burdens an interstate carrier that is a burden upon interstate commerce. Some burdens of that kind upon interstate carriers are necessary to the freedom of such commerce. A tax upon interstate commerce is always a burden upon that commerce, but a reduction of rates is quite a different thing.

One of the objects of laws prohibiting railroad companies from buying competing lines is to prevent extor-

tionate rates, and yet in Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, the court held that such a law was a valid exercise of the police power of the State, although the effect was to require the railroad company to submit to competition which would probably reduce its revenues from interstate business.

Just what effect the reduction of intrastate rates required by the order complained of will have upon interstate rates remains to be seen. The appellant alleges that it will be compelled either to reduce its interstate rates or to discriminate against its interstate traffic, but it is for the Interstate Commerce Commission to determine whether or not the interstate rates must be reduced. If the appellant should reduce its interstate rates without being compelled by law to do so it must be regarded as doing so voluntarily, and it is not at all certain that it would elect to do so. It is impossible to know what the Interstate Commerce Commission will require. If that Commission should require the appellant to lower its interstate rates it would do so because it had found those rates to be extortionate. If it should be willing to accept the intrastate rates fixed by the Kentucky Railroad Commisesion as the measure of fair interstate rates and for that reason require a reduction of the interstate rates that would not invalidate the State regulation, as such a reduction would result from the action of the Interstate Commerce Commission and not from the action of the State through its Railroad Commission. While the Interstate Commerce Commission has adopted a rule de-

claring a through rate which is greater than the sum of the locals to be *prima facie* unreasonable, the Commission does not regard itself as bound to accept a rate made by a State Railroad Commission as the measure of a fair interstate rate, and does not hold the carrier responsible for discrimination resulting from a reduction of intrastate rates in obedience to State authority.

> In the matter of freight rates between Memphis and Arkansas points, 11 I. C. C. R. 180.
> Hope Cotton Oil Co. v. Texas & Pac. R'y Co., 12 I. C. C. R. 265.
> Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415.

Therefore, the Interstate Commerce Commission is quite as free to regulate interstate rates after the State has limited intrastate rates as it was before, and whatever regulation it may make will be purely voluntary. If that Commission should conclude that in no case ought an interstate carrier be permitted to charge as a through interstate rate more than the sum of the local intrastate rates, and should make a rule to that effect, any change in interstate rates which might become necessary in order to conform to that rule would result from the action of the Interstate Commerce Commission and not from the action of the Kentucky Railroad Commission in limiting the local intrastate rates.

In Louisville & Nashville R. Co. v. Eubank, 184 U. S. 27, the court held the Kentucky long and short haul law to be void as a regulation of interstate commerce to

the extent that it prohibits the charging of more for a short haul than a long haul, where the long haul is an interstate haul, and thus declared that the State may not prohibit an interstate carrier from discriminating in favor of interstate shipments. In that case, however, the court said:

> "It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several States for the parts of the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the State over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce; and if not, how can it be held an interference by the State when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.
>
> "In the case supposed the States have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective State rates already, or from time to time, adopted by the State. In thus fixing the interstate rate Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and on the other hand, the State by such a statute regulates the local rate, but that it has the right to do. Congress does not directly or indirectly interfere with local rates by adopting their sum as the interstate rate."

That reasoning seems conclusive of this question. The most that can be claimed for appellant here is that under

the Act of Congress its through interstate rate can not be more than the sum of the locals, and that any change made by the State in the locals means a change in the interstate rate. But the action of the State would be the occasion and not the cause of the change in interstate rates. The real cause of that change, if it should be made, and should not be purely voluntary, would be the action of the Interstate Commerce Commission in accepting the local rates as the measure of interstate rates.

Another reason urged in support of the argument that the order complained of is a regulation of interstate commerce is that as interstate rates are formed by combinations of intrastate rates, and intrastate tariffs are filed with the Interstate Commerce Commission in compliance with regulations of that body, a change of intrastate rates necessarily means a change of interstate rates and a change of tariffs filed with the Interstate Commerce Commission. The regulations of the Interstate Commerce Commission, however, do not require carriers to base their interstate rates upon their intrastate rates, and a carrier can not by voluntarily electing to do so confer upon the Interstate Commerce Commission a power which it would not otherwise have. Besides, if the power of the State to regulate intrastate rates depended upon whether or not interstate rates were made by combining intrastate rates it would be within the power of the carrier to withdraw all intrastate rates from regulation by the State, and the power of the State would depend upon the form of the carrier's tariffs.

In New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission, 200 U. S. 361, the court, by the present Chief Justice, said:

> "Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary."

Even if the carriers were required by the Interstate Commerce Commission to base their interstate rates upon their intrastate rates the change in interstate rates which would be necessary by reason of the change of intrastate rates would result from the action of the Interstate Commerce Commission and not from the action of the State.

There is nothing to distinguish this case from any other case involving a regulation by the State of a few intrastate rates.

It is alleged that the points on the north bank of the river now have the same rates to interior points in Kentucky that the points on the south bank of the river have to the same interior points, and that they are entitled to the same rates, but no reason is given why they are entitled to the same rates. Whether or not they ought to have the same rates is for the Interstate Commerce Commission to determine.

If it be an injustice for Covington to have lower rates to interior Kentucky points than Cincinnati has, the injustice is one that either the carrier or the Interstate Commerce Commission may remove. But if the carrier should refuse to lower rates from Cincinnati and the Interstate Commerce Commission should determine that the carrier ought not to be required to lower those rates, then such injustice or inconvenience as might result would be one of the unavoidable effects of our dual form of government.

In New York, etc., R. Co. v. State of New York, 165 U. S. 628, in which the court upheld a New York statute relating to the heating of passenger cars the court, by Mr. Justice Harlan, in answer to the argument that conflicting State regulations of that character would be a hardship upon travel that could not be endured, said (pp. 632-633):

> "These possible inconveniences can not affect the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character can not be avoided so long as each State has plenary authority within its territorial limits to provide for safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the States covering the same ground."

It is alleged further that the present interstate rates through the Louisville and Cincinnati crossings are made

up of the rate to the Ohio River plus the rate south of the river, and if the through rate continues to be the sum of those rates as they now exist and the rate south of the river is reduced the through rate will be greater than the sum of the locals. A through rate is not *per se* unreasonable or discriminatory because it is greater than the sum of the locals. By a regulation of the Interstate Commerce Commission, quoted by complainant in its bill (Record, p. 115), the burden of proof is upon the carrier to defend a through rate which is greater than the sum of the locals, the Commission thus recognizing the fact that such a rate may be defended. Whether the difference between the existing through rate and the sum of the locals, as that sum will be when the Kentucky rates are reduced, will be so great as to make the through rate unreasonable can not be determined upon the facts which now appear. The question as to whether the Kentucky Railroad Commission or the Interstate Commerce Commission had jurisdiction to regulate the rates which the Kentucky Railroad Commission undertook by the order complained of to regulate can not depend upon what the carrier may have done in the past, or upon what changes it may have to make in its existing rates. If the carrier had lowered its interstate rates just before the order of the Railroad Commission was entered the jurisdiction of the Commission would not have been affected. The real basis of the objection urged, therefore, is not that the carrier is compelled to change interstate rates, but that its freedom of action as to interstate rates is restrained. If it is now necessary for the car-

rier to lower interstate rates to avoid discrimination, it follows that if, prior to the order of the Commission, it had already lowered interstate rates, it would, as a result of that order, have been denied the right to increase them, and thus the order of the Commission would have restrained its freedom of action just as effectually as it does under existing conditions.

If intrastate rates should be too high as compared with interstate rates and the State should require the carrier to reduce its intrastate rates just enough to avoid discrimination, a subsequent increase of the interstate rates would bring about a discrimination against interstate commerce, and it would be quite as reasonable to say that this discrimination is due to the barrier which the State regulation interposes to the increase of the intrastate rates, as it is to say that a reduction of intrastate rates causes a discrimination against interstate rates where the disparity results at the time the intrastate rates are reduced. In the one case the disparity results from the refusal of the carrier to reduce interstate rates and in the other the disparity results from the voluntary increase by the carrier of interstate rates. And it may be just as important for the carrier in the one case to increase his interstate rates as it is for him to maintain his existing interstate rates in the other case.

It is clear, therefore, that the question as to whether the regulation of a certain part of commerce is within the jurisdiction of the State or within the jurisdiction of Congress can not depend upon what change the carrier may be required to make in his existing arrangements in

order to comply with, or as a result of, that regulation. And it is also clear that if the carrier is entitled to have his freedom of action as to interstate rates wholly unrestrained by the State, there can be no regulation of intrastate rates by the State, since every regulation of intrastate rates must restrain the carrier to some extent in fixing interstate rates.

It is argued that even though a change of interstate rates is not necessary in order to avoid a violation of the law, such a change is made necessary by competition between interstate rates and intrastate rates, shipments being made to the State line on local bills of lading and then reshipped in order to obtain the benefit of local rates in all cases in which the through rate exceeds the sum of the locals. If the question were an open one such an argument might be pertinent to show that local regulation of interstate carriers is no longer feasible, and that all regulation should be national, but it being conceded that the State may, in some cases, regulate rates for transportation wholly within the State, such an argument is not pertinent to show that the particular regulation here complained of is a regulation of interstate commerce. Let us suppose two railroads parallel to the main line of the appellant, the one extending from Louisville to the Tennessee border and the other from the Tennessee border to Nashville, Tennessee, and that the through rates of appellant from Louisville to Nashville had been made to equal exactly the sum of the locals on the two intrastate roads. Let us suppose further that the Railroad Commission of Kentucky should reduce the rates on the

Kentucky road, thus reducing the sum of the locals and necessitating a reduction of appellant's through rate to meet the competition of the local roads. Surely learned counsel for appellant would not contend that the action of the State in reducing the rate on the local road was a direct regulation of interstate commerce, because the appellant, in order to meet the competition, must reduce its interstate rate. And yet there can not be any difference in principle between that case and the case at bar. The power of the State to regulate intrastate rates is not limited by the fact that the carrier is engaged in interstate commerce as well as in intrastate commerce, and any regulation of intrastate rates which is valid as applied to a carrier engaged in intrastate commerce alone is equally valid when applied to a carrier engaged in both intrastate commerce and interstate commerce.

The case of Gulf, etc., R'y Co. v. Texas, 204 U. S. 403, involved the rate upon a shipment of corn purchased from the Hardin Grain Company of Kansas City, Missouri, for delivery on railway track at Goldthwaite, Texas. After the sale of the corn by that company it purchased corn to fill the order for delivery to it at Texarkana, Texas, and it did this to get the benefit of the low intrastate rate fixed by the Texas Railroad Commission from Texarkana to Goldthwaite. The company from which the Hardin Company bought had the corn shipped from Hudson, South Dakota, to Texarkana, Texas, with the privilege to stop the corn at Kansas City for inspection and transfer, and its agent at Texarkana there received the corn and acted as the agent of the Hardin

Company in having the corn reshipped to Goldthwaite over the Texas Pacific Railway and the Gulf, Colorado & Santa Fe Railway, the companies operating which were parties to a through tariff from Kansas City to Goldthwaite. This court upon writ of error affirmed a judgment of the State court imposing upon the Gulf, Colorado & Santa Fe Railway Company a penalty for collecting as its part of what it claimed to be the through rate more than the local rate from Texarkana to Goldthwaite fixed by the Texas Railroad Commission.

There was no suggestion there that the regulation of the intrastate rate by the State of Texas was a regulation of interstate commerce, because the carrier was compelled by reason of that regulation either to lower its interstate rate or to permit that part of its interstate shipment within the State of Texas to become a local shipment, and subject to local regulations.

Changes in interstate rates made from business policy to meet changed business conditions brought about by a State regulation of intrastate rates can not be said to result directly from such State regulation.

In Missouri Pac. R'y Co. v. Kansas, 216 U. S. 262, this court held that an order of the Kansas Railroad Commission requiring passenger train service between the terminus of a branch line within the State and its point of intersection with the State line did not directly burden interstate commerce. The court, by the present Chief Justice, said:

> "It is said that as the State line may be but a mere corn field, and great expense must result to

the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the State line, but 20 miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions it is insisted that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the State of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the preformance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

While the carrier was compelled to either stop its interstate train at the State border or incur great expense in constructing terminal facilities there, yet the election to stop the interstate train was held to be voluntary.

It has repeatedly been held by this court that a State statute requiring an interstate carrier to assign colored intrastate passengers to coaches other than those provided for white passengers is not a regulation of interstate commerce.

Louisville, etc., R. Co. v. Mississippi, 133 U. S. 587.

Plessy v. Ferguson, 163 U. S. 537.

Chesapeake & Ohio R'y Co. v. Kentucky, 179 U. S. 388.

By upholding the right of the State to require carriers to separate colored intrastate passengers from white intrastate passengers, and at the same time denying to the State the right to separate colored interstate passengers from white interstate passengers the court recognizes the right of carriers to refuse to apply to interstate passengers State regulations as to intrastate passengers, even though discrimination may result, but as a matter of business policy the carrier finds it desirable to apply to interstate passengers the rule which the State imposes upon him as to intrastate passengers, and this the court has held he has the right to do.

Chiles v. Chesapeake & Ohio R'y Co., 218 U. S. 71.

But the fact that the practical result of the State regulation applying by its terms only to intrastate passengers is to bring interstate passengers under the same rule has never been thought by the court to be sufficient to invalidate such State regulations for the reason that there is no legal compulsion upon the carrier to extend the State regulation to interstate passengers.

It has been held by this court many times, and in cases upon which the railroad company here relies, that State regulations do not violate the commerce clause unless by their "necessary operation" they affect interstate commerce, and it can not be said that changes in interstate rates voluntarily made by a carrier as a matter of business policy to meet changes in intrastate rates forced upon him by the State are a part of the "necessary operation" of the State regulation. Besides, the fact that the

necessity for the changes may result from the fact that the carrier's interstate rates have been too high furnishes another reason why those changes can not be said to be a part of the "necessary operation" of the State regulation.

In Ames v. Union Pac. R'y Co., 64 Fed. 165, the judgment, in which was affirmed by this court in Smyth v. Ames, 169 U. S., Mr. Justice Brewer said:

> "Neither can I understand how the reduction of local rates, as a matter of law, interferes with interstate rates. It is true that the companies may, for their own convenience, to secure business, or for any other reason, rearrange their interstate rates and make them conform to the local rates prescribed by the statute; but surely there is no legal compulsion. The statute of the State does not work a change in interstate rates, any more than the Act of Congress prescribing interstate rates would legally work a change in local rates. Railroads can not plead their own convenience, or the effect of competition between themselves and other companies, in restraint of the otherwise undeniable power of the State."

In the Minnesota Rate Case (Shepard v. Northern Pac. R'y Co., 184 Fed. 765), decided by Circuit Judge Sanborn of the Eighth Circuit since this case was decided below, Judge Sanborn reached the conclusion that the reductions of intrastate rates involved in that case were so general and sweeping as to substantially burden and directly regulate interstate commerce, and he sought to avoid the effect of the language we have just quoted from the opinion of Mr. Justice Brewer in Ames v. Union Pac. R'y Co., by saying that the question was one of fact and

that no such condemnatory facts were presented to Mr. Justice Brewer in that case as were presented in the case then before the court, and that it was perhaps not too much to say "that no case has been found in the books in which any such proof of the unavoidable effect of general reductions of intrastate rates to substantially burden and directly regulate interstate commerce has ever been presented."

If the "unavoidable effect" of general reductions of intrastate rates is to directly regulate interstate commerce, surely the validity of such reductions can not depend upon the proof made in the particular case of such "unavoidable effect," as that is something of which the court must take judicial notice.

Judge Sanborn makes the extent to which the State regulation burdens interstate commerce the test of its validity, admitting that while a State regulation of a few rates or of the rates upon a single commodity may be valid such a regulation of a larger number of rates may be void merely because of the greater burden upon interstate commerce. It would follow from that reasoning that all the intrastate rates of a carrier might be changed by the State, one at a time, because the separate burden of each change upon interstate commerce would be slight, but that if all are changed at the same time it must be done by Congress because of the immediate and greater burden upon interstate commerce. The court failed to notice Smyth v. Ames, 169 U. S. 466, in which it was held that a statute fixing maximum rates for all the railroads of

the State of Nebraska as to all classes and commodities was within the power of the State. Nor did the court notice the case of Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, or the case of Chicago, etc., R. Co. v. Tompkins, 176 U. S. 167, in each of which the court assumed that the State had not trespassed upon the jurisdiction of Congress in making complete schedules of intrastate rates for interstate carriers.

If the test of validity of a State regulation of rates is the extent to which it affects interstate commerce, each interstate shipment is to be regarded as the whole of interstate commerce for the purpose of applying that test, interstate commerce being indivisible for that purpose, and therefore the number of shipments or the number of rates involved is immaterial.

If the jurisdiction of the State Commission depends upon the facts developed by the evidence as to the effect of its regulation upon interstate commerce, then that Commission is entitled to know what those facts are, and if the carrier does not bring to the attention of the Commission any facts tending to show that the regulation which the Commission is asked to make will affect interstate commerce it waives its right to object to the jurisdiction of that body to make the regulation. If the carrier may waive its objection to the jurisdiction of the Commission by failing to develop the facts in the courts there is no reason why it may not do so by failing to develop the facts before the Commission. But all this only serves to show that the question as to whether the State or Congress has jurisdiction to make

the regulation can not depend upon what the carrier may elect to prove as to the effect of the regulation, for if that be the test the jurisdiction may shift from the State to Congress or from Congress to the State at the carrier's will, the carrier alone having knowledge of the facts affecting the jurisdiction. The division of power between Congress and the States was not made for the benefit of the carriers as agencies of commerce but for the benefit of commerce itself, and therefore no rule ought to be adopted which would leave with the carriers the determination of the question as to whether the State or Congress shall have the power of regulation.

Whatever right interstate carriers have to be exempt from regulation by the State by virtue of the commerce clause of the Federal Constitution is derivative merely. It is not to be presumed that it is to the interest of the carriers to be regulated by Congress rather than by the States, for when Congress attempts to regulate them we find them contending that Congress is trespassing upon the jurisdiction of the States, and when one of the States attempts to regulate them we find them contending that the State is trespassing upon the jurisdiction of Congress. In theory, therefore, the struggle under the commerce clause is between Congress and the States, and not between the carriers and the States, nor between the carriers and Congress. At one time the carriers speak for the States and at another time they speak for Congress. Whenever the State is denied the power to make a rate regulation because it would affect interstate commerce it is not because the carrier has the

right to be exempt from that regulation, but because the power to make the regulation is in Congress. The power to regulate interstate commerce is given to Congress, it is true, in order that there may be uniformity of regulation of that part of commerce, but the power is primarily in the interest of the traveling and shipping public and not in the interest of the carriers. It follows, therefore, that whenever the State is stopped upon the ground that the commerce clause interposes a barrier to State regulation, Congress must have the power under the commerce clause to step in and make the regulation which the State is denied the power to make unless some fundamental right of the carrier be violated.

Rate regulation, in this respect, differs widely from the imposition of taxes, for of course Congress has not the power to impose taxes for State purposes, and if a tax imposed by the State upon interstate commerce is held invalid because in violation of the commerce clause, Congress can not intervene and impose the burden. But when a regulation is necessary for the protection of the people of a State either the State or Congress must have the power to make the regulation, and if Congress has not the power, the State must have the power as the State has all power for the protection of the public not given to Congress. It is manifest, therefore, that some things that are said in cases condemning State tax laws upon the ground that they burden interstate commerce may be misleading when applied to cases involving the validity of State regulations of

rates. The State, as we have seen, regulates rates in the exercise of its police power, which is broader than the taxing power. But even under the taxing power the State may indirectly burden interstate commerce by imposing taxes upon the instruments or vehicles of interstate commerce located in the State, and under the police power the State may *directly* regulate interstate commerce provided its regulations do not go beyond the necessities of the case, and do not conflict with any regulation made by Congress.

The power to regulate an intrastate rate is indivisible, and must rest wholly in Congress or wholly in the State. It can not be that the State may reduce the rate to a certain point and that the power to make a further reduction shall then be in Congress. Nor can it be that the power of the State to make the regulation depends upon whether or not the intrastate rate is a part of an interstate rate, for if that were true the carrier could at his will withdraw all intrastate rates from the control of the State. It also seems clear that the power of the State to regulate intrastate rates can not depend upon the number of rates to be regulated.

For the purpose of the argument that the State had no power to make the regulation complained of in this case it is fair to assume that the rates fixed by the Commission are reasonable, the only question being whether or not the mere fact that they burden interstate commerce (if that be a fact) shall relieve the carrier from the regulation, it being certain that Congress can not regulate intrastate rates, and that if the State can not require the

carrier to reduce these rates there is no power which can require the carrier to reduce them.

If the order of the Kentucky Railroad Commission fixing intrastate rates for the future is an unauthorized regulation of interstate commerce because it affects interstate commerce, then any action by the State of Kentucky through its courts which requires a reduction of existing intrastate rates is equally an unauthorized regulation of interstate commerce if such action affects interstate commerce. Therefore, under the doctrine for which the railroad company contends, if intrastate shippers should appeal to the Kentucky courts to grant them reparation under the common law rule prohibiting unreasonable rates, the courts and juries would have to inquire in each case just how far interstate commerce would be affected before they could know whether or not they would have power to grant relief.

In Western Union Telegraph Co. v. Commercial Milling Co., 218 U. S. 406, the court held that the common law is a rule of conduct proceeding from the supreme power of the State just as much as is a State statute, and that a State can no more regulate interstate commerce through the enforcement of common law rules than it can regulate interstate commerce through the enforcement of its statutes. If the validity of a rate order of the Commission under the statute depends upon the facts of the particular case as to the effect of the order upon interstate commerce the power of the State courts under the common law rule must depend upon the facts of the particular case as to the effect of the judgment

rendered, which is convincing that the validity of a rate order of the Commission can not depend upon the facts of the particular case as to the effect of the order upon interstate commerce.

If the power of the State to regulate intrastate rates depends upon the facts of the particular case as to the effect of the regulation upon interstate commerce, then as the power must be a continuing one the same regulation may be valid at one time and void at another as the effect upon interstate commerce changes. Whether the power of regulation is in the State or in Congress always depends upon the facts of the particular case as to the nature of the regulation, but never upon the facts of the particular case as to the effect of the regulation. In order that the effect upon interstate commerce of a State regulation may be such as to condemn that regulation that effect must be necessary or unavoidable, and an effect is not of that character if it depends upon conditions which are varying and uncertain, or which have been created by the carrier. Whether or not the State may directly burden interstate commerce in the exercise of its police power depends upon the necessities of the case, and the court may inquire into the facts of the particular case for the purpose of determining whether necessity for the regulation exists, provided the regulation directly burdens interstate commerce. If the burden results indirectly from the regulation of purely internal commerce no such inquiry arises as the State then has exclusive jurisdiction.

That it is necessary for the protection of shippers that the power to require intrastate rates to be reduced shall exist somewhere can not be doubted, and the question is whether the State or Congress shall have that power. It being clear that Congress has not the power, it follows that the State must have the power.

In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, the court, by Mr. Justice Peckham, referring to the power of Congress to regulate private contracts affecting interstate commerce, said (231):

> "If neither Congress nor the State Legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or national, which can legislate upon the subject or prohibit such contracts. This can not be the case."

Even under the test laid down by Judge Sanborn the regulation complained of in this case does not so substantially burden interstate commerce as to render it invalid, there being no general or sweeping reduction of intrastate rates.

In the Minnesota case rates on all classes and commodities were involved, and it appeared that much the greater part of the traffic of the carriers in Minnesota was interstate traffic, and that the lines of the carriers affected extended through several States in each of which the carriers had maintained the same basis of rates as to both interstate traffic and intrastate traffic, the traffic conditions in each of those States being the same. In the case at bar, however, the single railroad company in-

volved operates no line beyond the border of the State at the points from which the rates apply except that at Covington the carrier's line does extend to Cincinnati on the north bank of the Ohio River, and it does not appear that the interstate business moving through the points from which the rates apply to the several points to which the rates are fixed exceeds the intrastate business from the points through which the interstate business moves, the allegation being that the interstate business is at least one-half the whole. Besides, grain being the principal article affected even Judge Sanborn would recognize as controlling the cases of Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, and Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579, in which the rates involved applied only to coal.

Thus far we have assumed that the statute itself is not a regulation of interstate commerce, but it seems clear that if the order of the Commission is an unauthorized regulation of interstate commerce merely because it affects interstate commerce the statute itself is void for the same reason. It is quite clear that the statute restricts the Commission to the regulation of intrastate rates, and it is equally clear that the rate order complained of is within the power granted to the Commission. Therefore, if the order is void because it is a regulation of interstate commerce, the statute itself must be void because it authorizes such an order. The validity of the statute is determined not by what the Commission has done, but by what it is authorized to do. While the Commission is not authorized to make schedules of rates

it is empowered to change rates upon specific complaints until all intrastate rates have been changed, and the court judicially knows that when that has been done the relation previously existing between interstate rates and intrastate rates will be completely changed. Therefore, if the State has no power to make any regulation that will disturb that relation it follows that the statute itself is void. And if the statute is void because it burdens interstate commerce it is impossible to frame a statute that would be valid, and all State regulation is at an end, notwithstanding the long line of cases recognizing the exclusive power of the State to regulate intrastate rates. The conclusion of the lower court that neither the McChord Act nor the rate order complained of is a regulation of interstate commerce is supported not only by the decisions we have cited, and by many other decisions of this court, but by many decisions of the circuit courts, and by a long line of reports of the Interstate Commerce Commission.

Perkins v. Northern Pac. R'y Co., 155 Fed. 445.
St. Louis, etc., R. Co. v. Hadly, 168 Fed. 317.
Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957.
Arkansas Rate Cases, 187 Fed. 290.
In the matter of Freight Rates between Memphis and Arkansas Points, 11 I. C. C. R. 180.
Hastings Matting Co. v. Chicago, etc., R'y Co., 11 I. C. C. R. 675.
Saunders & Co. v. Southern Express Co., 18 I. C. C. R. 415.

V.

Complainant Has an Adequate Remedy at Law.

As the bill attacks the statute and the order of the Commission upon the ground that the statute is void upon its face and that the order of the Commission was made upon evidence which bore no "proper relation" to the question investigated, and is a regulation of interstate commerce, the remedy at law is adequate, and therefore, a court of equity has no jurisdiction. As to whether or not the statute is void upon its face can be quite as easily determined in a court of law as in a court of equity, and also the question whether or not the order of the Commission is a regulation of interstate commerce, and whether or not the evidence heard by the Commission had any bearing upon the question investigated, if that be a proper matter for inquiry.

The reasoning of the court in *Ex parte* Young, 209 U. S. 123, in answer to the argument that a court of equity had no jurisdiction because there was an adequate remedy at law seems conclusive that plaintiff under the Kentucky statutes and decisions has an adequate remedy at law. Certainly the plaintiff by violating the law would not take the risk of penalties which might overwhelm him for the reason that all violations of the order of the Commission prior to the first conviction constitute but a single offense, and the maximum penalty is a fine of $1,000.00. In the Young case, after saying that it would be a wonder if a single agent could be found to violate

the law even once in view of the risk of imprisonment for five years, the court said:

> "If, however, one should be found, and the prosecutor should elect to proceed against him, the defense that the act was invalid, because the rates established by it were too low, would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. * * * Suits for penalties, or indictment or other criminal proceedings for a violation of the act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the act invalid."

Again the court said:

> "To await proceedings against the company in a State court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest State court, would place the company in peril of large loss and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid."

There is no allegation in the bill that the rates complained of are confiscatory, but merely that they are arbitrary, unjust and unreasonable, which is a conclusion of law, and is not equivalent to an allegation that the rates are so low as not to yield the plaintiff a fair return upon its investment. The only inquiry in such a case which no other court than a court of equity can properly make is whether or not the rates are confiscatory, and the bill does not ask the court to make that

inquiry. Whether or not either the statute or the order of the Commission is void upon any other ground can be as easily determined in a court of law as in a court of equity.

The general rule is that the Federal courts will not enjoin criminal prosecutions in the State courts (Fitts v. McGhee, 172 U. S. 516; *Ex parte* Young, 209 U. S. 123), and while the court held in McChord v. Louisville & Nashville R. Co., 183 U. S. 483, that the Railroad Commission might be enjoined from recommending indictments, yet where the members of the Commission deny, as they do in this case, any intention or threats to recommend indictments, and it is manifest that only one indictment would lie for all violations of the Commission's order prior to the first conviction, there seems to be no ground for an interlocutory injunction. If a criminal prosecution should be instituted upon the recommendation of the Commission there is no reason whatever why the question as to whether or not the statute or the order of the Commission is void upon its face should not be determined in such a prosecution.

VI.

No Right to Injunction as to Order Awarding Reparation.

That part of the bill which relates to the reparation order is clearly bad. The two orders are entirely separate and distinct. The act of the Commission in fixing rates for the future was a legislative act, while the act of the

Commission in awarding reparation for the past was an administrative act. The award was made under Section 829 of Kentucky Statutes, and can be enforced only by a proceeding in court. There is no room whatever for the contention that the proceeding for reparation was under the McChord Act. If the Commission was not authorized by Section 821 or Section 829 of Kentucky Statutes to award reparation it was not authorized to do so at all, and so the question is one of statutory construction. There is no suggestion in the bill that Section 829 of Kentucky Statutes violates the Federal Constitution, but it is argued that the statute is unconstitutional because the carrier is allowed to introduce no evidence in the courts other than that presented to the Commission. But as the carrier is given full opportunity to present all his evidence to the Commission it is difficult to understand how he is denied any constitutional right by not being permitted to present additional evidence to the court. It would be quite as reasonable to say that a party who has been given an opportunity to introduce all his evidence before an examiner or commissioner is deprived of his property without due process of law because he is denied the right to present additional evidence to the court. But the bill itself as to the order of reparation presents no Federal question, and, therefore, is multifarious.

1 Foster's Federal Practice, Sec. 74, p. 388.
Keasby & Mattison Co. v. Philip Carey Mfg. Co., 113 Fed. 432.

Even if the bill is not multifarious, the order refusing an injunction restraining the enforcement of the reparation order must be affirmed because that order is entirely separate and distinct from the legislative or rate order of the Commission, and as to it the bill presents no Federal question, and also because the Commission had power by virtue of Sections 816, 821 and 829 of Kentucky Statutes to make the award. It was held by the Court of Appeals of Kentucky in Louisville & Nashville R. Co. v. Commonwealth, 99 Ky. 132, that Section 816 is still in force to the extent that it gives a civil remedy, and was held by this court in McChord, etc., v. Louisville & Nashville R. Co., 183 U. S. 483, that Section 829 is still in force.

It certainly can not be that the carrier may charge any rate it pleases, however excessive, and leave the shipper wholly without any remedy except to prevent the carrier from charging the excessive rate after the Commission has found it to be excessive. If that be the law the Commission may delay the determination of the complaint indefinitely and thus deprive the shipper of all remedy for the period between the filing of the complaint and its determination, for if the McChord Act is the measure of the power of the Commission, the power to make an award for the period elapsing between the filing of the complaint and its determination no more exists than the power to grant reparation for the time prior to the filing of the complaint. As held by the court in the McChord case, the purpose of the McChord Act was to enlarge the rights of shippers and the powers of the Commission and not to restrict them. At common

law a shipper had the right to recover of the carrier the excess collected over a reasonable rate, and surely no common law right was taken away by the statute. If such a right still exists there is no reason to suppose that the Legislature intended to repeal the remedy given by Section 829 of Kentucky Statutes for the recovery of the excess. Even if Section 829 had been repealed, the Commission would have had power under Section 821 to make and enforce an award for the excess. But whether so or not, the question is one which has no bearing on the validity of the McChord Act or on the validity of the order of the Commission fixing a rate for the future, and is, therefore, exclusively for the State courts. All other reasons aside, the fact that the persons in whose favor reparation was granted are not before the court, furnishes a sufficient reason, as held by the lower court, for not enjoining the enforcement of the order of reparation.

VII.

Right to Injunction Must Be Free From Doubt.

That an injunction ought not to be granted by a Federal court to restrain the enforcement of rates fixed by or under a State statute, unless the right thereto is reasonably free from doubt is well settled.

In *Ex parte* Young, 209 U. S. 123, the court said:

> "Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to

draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by State officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts."

Again in Willcox v. Consolidated Gas Co., 212 U. S. 19, the court said:

"Upon a careful consideration of the case before us we are of opinion that the complainant has filed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the State of New York are in fact confiscatory."

We ask that the judgment appealed from be affirmed.

Respectfully submitted,

JAMES BREATHITT,
Attorney General.

EDWARD W. HINES,
For Appellees.

CHARLES C. MCCHORD,

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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~416~~. 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - Appellant,

versus

ADAM T. SILER, LAURENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - - - - - - - - Appellees.

REPLY BRIEF FOR APPELLANT.

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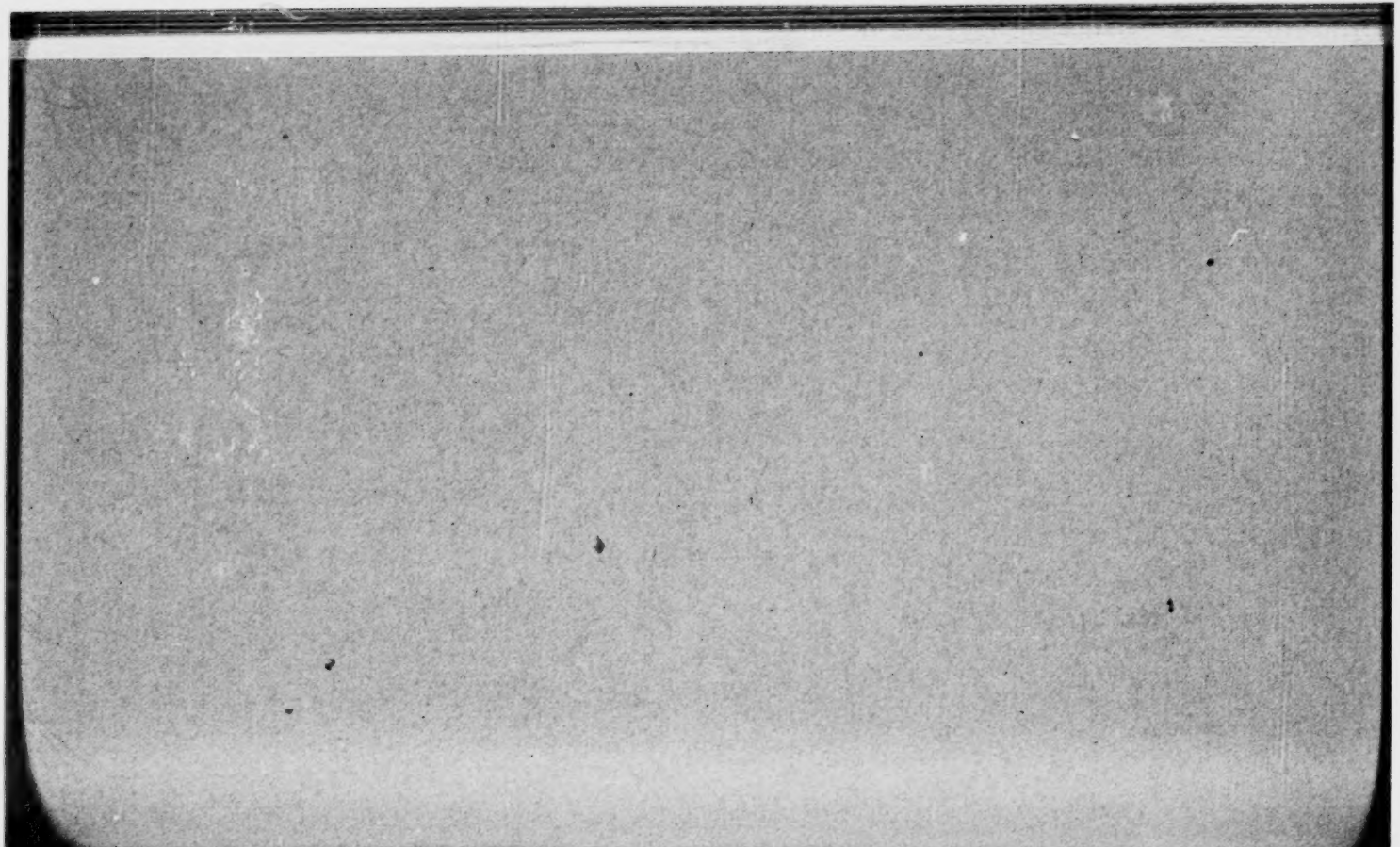

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 507.

Louisville & Nashville Railroad Company - Appellant,

versus

Adam T. Siler, Laurence B. Finn and Lew P. Tarlton, Individually and as Constituting the Railroad Commission of Kentucky, - Appellees.

REPLY BRIEF FOR APPELLANT.

I.

THE ORDER OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND A REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

A.

Appellees' Counsel Misapprehend the Facts Upon Which This Proposition is Maintained.

The *facts* upon which appellant has maintained the proposition that the rate order of August 10, 1910, of the

Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and a regulation of interstate commerce, and is, on that account, unconstitutional and void, are stated concisely on pages 149 and 150 of our original brief, and are set forth in detail on pages 150 to 168, inclusive, of that brief. Reference to those pages of our brief will show that appellees either inadequately understand or entirely misapprehend the facts upon which this contention is based.

For example, appellant does not contend, as is indicated by appellees on page 64 of their brief, that the order of the Commission is a regulation of interstate commerce, for the mere reason that the rates to which it relates "enter into and form a part of certain interstate rates set forth in a tariff filed with the Interstate Commerce Commission." As is clearly stated on page 149 of our brief, and explained *in extenso* on pages 150 to 153, inclusive, the order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic, regardless of the filing of any specific tariff with the Interstate Commerce Commission; and the results arising from the filing of such tariff with the Interstate Commerce Commission are merely incidental, and not by any means the prime cause of the effect complained of. The allegations set forth on pages 150 to 153 of our brief in support of the first statement of fact—that the order of the State Railroad Commission would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate

revenues and traffic—and the pleadings cited on pages 165 to 168, inclusive, of our brief in support of the third statement of fact—that the order of the State Railroad Commission, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities and commerce of the State of Kentucky and against citizens, localities and the commerce of other States—are a complete refutation of the statement made on page 64 of appellees' brief, that there is nothing in the bill to show that a reduction of the intrastate rates will necessitate a reduction of interstate rates. It is clear, likewise, from what appellees have to say on page 65 of their brief, that they do not fully appreciate the unjust discrimination which would necessarily arise if the order of the State Railroad Commission were put into effect. For example, appellees mention only that discrimination which would arise from making different rates from the north bank and from the south bank of the river. They ignore completely the discrimination which would arise from the application of different rates on interstate traffic and intrastate traffic for the same service from the same points, and the discrimination which would arise from the enforced violation of the long and short haul clause of the fourth section of the Act to Regulate Commerce, and the violation of similar provisions of the statutes of the State of Kentucky. We submit that the facts as to unjust discrimination set forth in the second and third statements of fact, on pages 149 and 150 of our brief, are fully established by the uncontradicted allegations of the verified pleadings of appellant, and by supporting affidavits, as set forth in detail

Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and a regulation of interstate commerce, and is, on that account, unconstitutional and void, are stated concisely on pages 149 and 150 of our original brief, and are set forth in detail on pages 150 to 168, inclusive, of that brief. Reference to those pages of our brief will show that appellees either inadequately understand or entirely misapprehend the facts upon which this contention is based.

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revenues and traffic—and the pleadings cited on pages 165 to 168, inclusive, of our brief in support of the third statement of fact—that the order of the State Railroad Commission, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities and commerce of the State of Kentucky and against citizens, localities and the commerce of other States—are a complete refutation of the statement made on page 64 of appellees' brief, that there is nothing in the bill to show that a reduction of the intrastate rates will necessitate a reduction of interstate rates. It is clear, likewise, from what appellees have to say on page 65 of their brief, that they do not fully appreciate the unjust discrimination which would necessarily arise if the order of the State Railroad Commission were put into effect. For example, appellees mention only that discrimination which would arise from making different rates from the north bank and from the south bank of the river. They ignore completely the discrimination which would arise from the application of different rates on interstate traffic and intrastate traffic for the same service from the same points, and the discrimination which would arise from the enforced violation of the long and short haul clause of the fourth section of the Act to Regulate Commerce, and the violation of similar provisions of the statutes of the State of Kentucky. We submit that the facts as to unjust discrimination set forth in the second and third statements of fact, on pages 149 and 150 of our brief, are fully established by the uncontradicted allegations of the verified pleadings of appellant, and by supporting affidavits, as set forth in detail

on pages 153 to 168, inclusive, of our brief, with reference to those facts.

B.

In addition to the Facts Heretofore Set Forth in Support of this Proposition, there is to be Considered the Fact, of Which the Court Will Take Judicial Notice, that the Elements of Intrastate Traffic Handled on Interstate Railroads and the Elements of Interstate Traffic Handled on Such Railroads are so Intermixed, Interdependent, Indivisible, and Inseparable, that it is Impossible, in Connection with Such Railroads, to Regulate or Adjust the One Kind of Traffic Without Regulating, Adjusting and Interfering with the Other Kind of Traffic.

That the elements of intrastate traffic handled on interstate railroads and the elements of interstate traffic handled on such railroads are so interwoven, interdependent, indivisible, and inseparable, that it is impossible, in connection with such railroads, to regulate or adjust the one kind of traffic without regulating, adjusting and interfering with the other kind of traffic, is a fact which, in the light of human experience, is incapable of dispute, and which does not require proof.

As was said by Judge Amidon, in the case of *Northern Pacific R'y Co.* v. *Keyes*, 91 Fed. 47, 52:

> The fundamental question in all cases like these is, will the rate prescribed by the State pay the expense of doing the local business and leave to the carrier a reasonable compensation upon the fair value of the property which it employs in performing the service? Certain of the factors necessary to a

determination of this question are capable of definite knowledge; others must forever rest largely upon opinions. The income derived by the carrier from the business which it conducts within the State can be ascertained accurately from the records of the company, but the expense of doing that business is not susceptible of mathematical ascertainment. Many of its items apply equally to local and interstate business; the different kinds of traffic are often carried in the same train and not infrequently in the same car; it is absolutely impossible to divide the cost of traffic thus moved, and say that this amount should be attributed to local business and that amount to interstate.

Prof. Logan G. McPherson, Lecturer on Transportation at Johns Hopkins University, in his book, "The Workings of the Railroads," says, at page 91:

The expenditures of a railroad must be regarded as a whole. This total expenditure can not be allocated among particular trains or particular cars, and therefore it can not be determined just what it costs to haul any particular commodity any particular distance. This fundamental concept, which no student of railway economics refutes, was announced by Judge Cooley, its first chairman, in one of the early reports of the Interstate Commerce Commission.

Mr. Emory R. Johnson, Assistant Professor of Transportation and Commerce in the University of Pennsylvania, member of the Isthmian Canal Commission from 1889 to 1903, says in his work on "American Railway Transportation," pages 272 to 274:

In whichever sense the term 'cost' is used it is practically impossible for the railroad official to as-

certain what are the costs of a particular transportation service. Every railroad engaged in general traffic carries thousands of different commodities; the cargo of a freight train is usually made up of a large variety of articles and frequently several kinds of goods are sent in the same car; to enable the company to run a train or haul a car the roadway, depots, yards, and all the different parts of the service have to be provided; out of the gross receipts obtained from the shippers and passengers the various expenses of the company are met, but no company is able to determine just what part of the expense incurred by the several branches of this service should be charged against the man who has sent a ton or a carload of goods a certain distance over the company's road, or against the man who has traveled a given number of miles on the line. Most of the expenditures of a railroad company are joint costs, *i. e.*, they are paid out for the maintenance of the service as a whole and have little direct connection with any particular act of transportation; the tracks, station yards, offices and administrative departments all assist in performing every one of the activities of the company. The revenues obtained from each freight and passenger service performed should, if possible, be made to contribute something, but no one can say just how much, toward the joint or aggregate costs of maintaining and operating the transportation organization. About as far as the traffic official can go in measuring costs is to calculate the expenses of running a train. The outlay for wages of train crew, for fuel, oil, repairs and maintenance of cars and locomotives can be calculated rather closely, and thus the expense of moving a particular train a mile, the train mile cost, can be got at with some degree of certainty, but unless the train is loaded with only one commodity this does not enable the statistician to calculate what movement expenses

> are incurred in connection with each or any of the articles of freight of which the train's cargo is composed. Besides meeting the expenses due to moving the train, the receipts from the traffic carried by the train should contribute a greater or less amount toward defraying the company's joint cost, but how much of the joint expenses to charge against any particular train no one can determine, much less can one decide how much of the joint costs are incurred by each commodity in the cargo.

And the same opinion as to the impossibility of dividing the costs or elements of interstate traffic from the costs or elements of intrastate traffic is held by substantially all accountants and economists by whom the subject has been considered.

As was said long ago by Stone, J., in *South & North Alabama Railroad Co.* v. *Pilgreen*, 62 Ala. 307, railroads "are of too general use for the courts not to know generally their *modus operandi*." And this court has said (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 37) that it

> can not fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the

States to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land.

The Act to Regulate Commerce, in terms, gives to the Interstate Commerce Commission authority over interstate commerce only, and yet all classifications of the accounts of interstate railroads prescribed by the Interstate Commerce Commission, in accordance with the Twentieth Section of the Act to Regulate Commerce, necessarily embrace all of the business of those railroads, interstate and intrastate combined. For example, the Form of General Balance Sheet Statement prescribed by the Interstate Commerce Commission for Steam Roads, in accordance with that Section, provides for showing as assets *all* property owned as investment, including physical property owned, securities owned, and investments, both on account of interstate traffic and on account of intrastate traffic, and *all* working assets, whether such assets are required for the conduct of the interstate or the intrastate traffic; and as liabilities there must be shown *all* stock, *all* mortgaged, bonded, and secured debt, and *all* working liabilities, relating both to interstate and to intrastate business. In the Classification of Expenditures for Road and Equipment as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, carriers subject to the Act are required to classify *all* items of Road, such as right-of-way and station grounds, grading, tun-

nels, bridges, trestles and culverts, ties, rails, ballast, station buildings and fixtures, water stations, fuel stations, grain elevators, etc., *all* items of Equipment, such as steam locomotives, passenger train cars, freight train cars, work equipment, etc., and *all* General Expenditures, such as law expenses, stationery and printing, insurance, taxes, etc., regardless of the question as to whether the expenditures were required for the purpose of the interstate traffic or for the purpose of the intrastate traffic. Manifestly, many of these items of property, such as right-of-way, ties, ballast, and station buildings, would be required if only an interstate traffic were conducted, or if only an intrastate traffic were conducted, and it is impossible for any one to say, except in accordance with some arbitrary rule, how much of this property shall be apportioned to the one account, interstate, or to the other account, intrastate. The Classification of Operating Revenues as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, requires classification of *all* Freight Revenue, *all* Passenger Revenue, *all* Excess Baggage Revenue, etc., although, with particular reference to the revenues, it is, as a general rule, possible to make a distribution between interstate traffic and intrastate traffic. The Classification of Operating Expenses as prescribed by the Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, requires the distribution of *all* expenses for Maintenance of Way and Structures, *all* expenses for Maintenance of Equipment, *all* Traffic Expenses, *all* Transportation Expenses, and *all* General Expenses. It is manifestly impossible to say, except in accordance with some arbitrary rule, what part of

Maintenance of Way and Structures Expenses (such as ballast, ties, rails, other track material), what part of Maintenance of Equipment Expenses (such as repairs, renewals and depreciation of steam locomotives, passenger train cars and freight train cars), what part of Traffic Expenses (such as advertising, stationery and printing, and outside agencies), what part of Transportation Expenses (such as yardmasters and their clerks, yard conductors and brakemen, road enginemen, fuel for road locomotives, train supplies and expenses), or what part of General Expenses (such as salaries and expenses of general officers, law expenses, etc.), shall be charged to intrastate traffic, and what part shall be charged to interstate traffic. No one can say, for example, what part of the expenses resulting from the wearing and rotting of ties or the wearing and rusting of rails between Newport, Ky., and Bardstown, Ky., shall be charged against the interstate traffic moving between those points and what part shall be charged against the intrastate traffic moving between those points, and under investigation in this proceeding. No one can say, except as the result of an arbitrary rule, what part of the wages of enginemen and trainmen, or what part of other train expenses, shall be charged against interstate and intrastate traffic, respectively, when the two kinds of traffic are carried on the same train, and frequently in the same cars. The Interstate Commerce Commission, in accordance with Section 20 of the Act to Regulate Commerce, not only prescribes the classification of Operating Expenses and the Property accounts, but prescribes what items shall be treated as Operating Expenses and what items shall be treated as Additions and Betterments, or Capital or Property accounts. And these

requirements of the Interstate Commerce Commission necessarily relate to the entire business of the carriers, interstate and intrastate combined. The lines of the Louisville & Nashville Railroad Company extend through many States; many of the expenses incurred by it in conducting its business (such as salaries and expenses of general officers) are incurred in common for the traffic of the several States through which it passes; and a large part of its property (such as general office building, and its rolling stock equipment which is continually passing from one State to another) is used in common for the business of the several States. The property and expenses incurred in conducting the business of one State are thus inseparably intermixed with the property and expenses incurred in conducting the business of other States, and no one can say, except in accordance with some arbitrary rule, how a distribution shall be made between the several States; and, even if a distribution between States can be effected, no one can say, except in accordance with an arbitrary rule, how the distribution of property and expenses attributable to any single State shall be effected as between interstate and intrastate traffic.

Although the present discussion is one of fact, it may be well at this point to anticipate a question of law, in order to show why the fact of intermixture and inseparability of the elements of interstate commerce and of intrastate commerce as conducted by interstate railroads is material to the contention of appellant that the order of August 10, 1910, of the Railroad Commission of Kentucky would, if enforced, directly and necessarily amount to and operate as an interference with and regulation of interstate commerce. Appellant, the Louisville

& Nashville Railroad Company, as is well known, and as is shown by the pleadings, is a carrier of both interstate commerce and intrastate commerce. The two kinds of commerce are carried on the same trains, frequently in the same cars, and use jointly the same rails, ties, and other facilities. It is impossible to divide the facilities so jointly used or to distribute the elements of the business between interstate traffic and intrastate traffic. It is contended by appellant that the usual methods of handling interstate traffic and intrastate traffic on interstate railroads, and the resulting intermixing, interdependence, and indivisibility of the two kinds of traffic as handled on such railroads, are so well known that a court will not require evidence thereof because it would not be good sense so to do; and that while a State may regulate its "strictly internal commerce" *it is impossible for a State to regulate the intrastate rates of interstate railroads without interfering with, burdening, and regulating interstate commerce.* The obstacle in the way of State regulation in such cases is not to be found in the denial of the abstract right of a State to affect, in the legitimate exercise of its reserved powers, commerce of a local nature which does not seem to require a uniform rule of regulation, but the objection is to be found in the practical fact that *where both interstate commerce and intrastate commerce are carried on by the same agencies there is no traffic of a local nature, no traffic which does not require a uniform rule of regulation; and all traffic carried on by interstate railroads is either, on the one hand, clearly interstate commerce, or, on the other hand, is intrastate commerce "among" the States, which is national in its character and demands uniformity of*

regulation, and with respect to which Congress alone can legislate.

It is evident that that part of commerce "among" the States, both interstate and intrastate, which is carried on by interstate railroads is national in its character and demands uniformity of regulation, and that, therefore, Congress alone can legislate with respect to such traffic, and when Congress has not legislated it necessarily follows that such traffic is to be free from all legislation whatever.

Having thus amplified the facts upon which we base our proposition, we re-state them as follows:

1. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, directly, unavoidably, and with compelling force, interfere with and reduce appellant's interstate rates and interstate revenues and traffic.

2. The order of the State Railroad Commission reducing appellant's intrastate rates would, if put into effect, destroy commercial relationships for many years existing between points in the State of Kentucky and points outside of the State, and would create unjust discriminations in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

3. The order of the State Railroad Commission reducing appellant's intrastate rates, if put into effect, would, where any election exists, directly, unavoidably, and with irresistible force, compel appellant either to reduce its interstate rates and interstate revenues, or to discriminate unjustly in favor of citizens, localities, and commerce of the State of Kentucky and against citizens, localities, and the commerce of other States.

4. The elements of intrastate traffic handled on interstate railroads and the elements of interstate traffic handled on such railroads are so intermixed, interdependent, indivisible, and inseparable that it is impossible, in connection with such railroads, to regulate or adjust the one kind of traffic without regulating, adjusting and interfering with the other kind of traffic.

C.

The Authorities Cited by Appellees Are Not in Conflict With Appellant's Proposition; and Where Appellees' Conclusions of Law in this Respect Are Opposed to the Proposition, Such Conclusions of Law Are Not Supported by the Authorities Cited.

As was pointed out by us on page 189 of our original brief, with reference to the opinion of Judge Sanborn in the case of *Shepard* v. *Northern Pacific R'y Co.*, 184 Fed. 765, the principles and rules of law by which these orders and acts must be tried have been conclusively established by the decisions of the Supreme Court, and it would seem that the question of interference with interstate commerce is to be determined by ascertaining whether or not the facts established show an interference with, and a burden upon, and a regulation of, interstate commerce, which is prohibited by the settled principles of law.

Appellees, however, at pages 64 to 115, inclusive, of their brief, cite numerous authorities, many of which appear to us irrelevant, some of which merely announce well established principles which are not at all in conflict with our contentions, and not any of which support a

single conclusion of law drawn by appellees against our proposition.

For example, on page 66 of their brief appellees cite the case of *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204, to show that for the purpose of Government regulation commerce is divided into three parts. This citation is not at all relevant to the proposition under discussion, as is afterward admitted by appellees in their discussion, on pages 70 and 71 of their brief, of the case of *County of Mobile* v. *Kimball*, 102 U. S. 691. And throughout the discussion of this proposition appellees repeatedly cite cases to show the power of a State to regulate an "auxiliary" of commerce, although they admit, on page 71, that in the case at bar we are dealing with a regulation of commerce strictly considered, and not with a regulation of a mere auxiliary of commerce. And, as also admitted by appellees (on page 71 of their brief), either the State or Congress has exclusive jurisdiction of commerce strictly considered.

We are in entire accord with the statement that either the State or Congress has exclusive jurisdiction of commerce strictly considered, and we contend that the commerce strictly considered which is carried on by interstate railroads is commerce which extends to and affects more States than one, and with respect to which a uniform rule of regulation is required, and is, therefore, commerce over which exclusive jurisdiction rests with the Congress of the United States. Appellees say (pp. 66 and 67 of their brief):

> That each State has exclusive jurisdiction to regulate transportation of goods wholly within its borders has been so often decided by this court that it is no longer an open question.

To this statement we assent, but we do not agree to the unwarranted attempt of appellees to treat the traffic of a State "wholly within its borders" or "the strictly internal commerce" of a State as synonymous with the intrastate traffic of a State as usually understood. None of the cases cited by appellees supports in any way their attempt to show that all intrastate traffic of a State is within that State's exclusive jurisdiction.

In the leading case of *Gibbons* v. *Ogden*, 9 Wheat. 1, the first cited by appellees in this connection, the delimitation of the exclusive jurisdictions of the Nation and the State, respectively, is clearly set out. It is clear from the distribution of powers there announced by Chief Justice Marshall that the commerce reserved to the States is not *all* intrastate commerce, but is only that intrastate commerce which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. Accordingly, we agree with our opponents that either the State or Congress has exclusive jurisdiction of commerce strictly considered, such as that with which we are dealing in the case at bar. And we assert:

(a)—That the power of Congress over interstate commerce is exclusive.

(b)—That the power of Congress is exclusive over that part of intrastate traffic which extends to or affects other States, or with which it may be necessary to interfere for the purpose of executing some of the general powers of the Government. And—

(c)—That the power of the State is exclusive over that part of intrastate commerce only, which is

> completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

In the citation from the case of *The Daniel Ball* v. *United States,* 10 Wall. 557 (on page 67 of their brief), appellees have omitted the word "and" between the word "State" and the word "does," in the next to the last line, thereby materially changing the sense of the citation. This court did not say, in the case of the *Daniel Ball,* that that commerce which is carried on entirely within the limits of the State does not extend to or affect other States, and is, therefore, excluded from Federal control, but what this court did say was just what we have stated above—that the commerce excluded from Federal control is that part of intrastate commerce which "does not extend to or affect other States."

Apart from the fact that the rule announced in *Western Union Telegraph Co.* v. *Texas,* 105 U. S. 460 (cited by appellees on pages 67 and 68 of their brief) relates merely to the "purely internal commerce of the State" which "does not affect other nations or states or Indian tribes," and is in entire consonance with the distribution of powers contended for by us, it is to be noted that the statement of the court with reference to the tax which might be laid by a State upon messages exclusively within its own jurisdiction is a mere dictum, and the judgment of the Supreme Court of Texas in that case was reversed and the cause remanded, with instructions to reverse the judgment of the district court and proceed thereafter as justice might require. It is further to be noted that in the later case of *Western Union Telegraph*

Co. v. *Kansas*, 216 U. S. 1, 27, this court held that a statute, under which a fee was demanded as a condition of the right of a telegraph company to do a local business in the State of Kansas, and which, in terms, applied to intrastate traffic only, but which, reasonably interpreted, either directly or by its necessary operation burdened interstate commerce, was unconstitutional.

The case of *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288 (cited by appellees on page 68 of their brief) is not controlling, for the reason that the question of interference with interstate commerce was not raised in that case. The case involved only the question of violation of the Fourteenth Amendment to the Constitution of the United States and the question of impairment of the obligation of a contract alleged to exist by reason of the ordinance of 1787 "for the government of the territory of the United States northwest of the river Ohio." But even if the case were controlling, the citation is not in point, for Mr. Justice Field merely said what we have stated above—that the jurisdiction of a State is exclusive with reference to its intrastate commerce "which is wholly confined within its limits." Obviously, this has no reference to that intrastate commerce which extends to or affects other States.

The case of *Missouri Pacific R'y Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612 (cited by appellees on pages 68 and 69 of their brief) is not in point, because, as was said by the court (p. 621), that case did not rest upon any distinction between interstate commerce and that wholly within the State. The law applied in that case was not established by State authority, but was merely adminis-

tered by a State court. The right of State courts to administer the common law as relating to interstate commerce is not in issue. And in that case the court distinguished the case of *McNeill v. Southern R'y Co.*, 202 U. S. 543, in which a rule of action established by a State Railroad Commission, which did affect interstate commerce, was held to be a regulation of such commerce, and, in consequence, repugnant to the commerce clause of the Constitution.

The case of *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171 (cited by appellees on page 69 of their brief), is not applicable. That case covered merely the right of a State to tax a company for the privilege of doing a local business which it was free to renounce, and which it could renounce or retain without effect upon its interstate traffic. Appellant, in the case at bar, is not free to renounce its intrastate traffic in Kentucky; and, as was held by this court in the case of *Western Union Telegraph Co. v. Kansas, supra*, and in the case of *Pullman Co. v. Kansas*, in the same report, if a statute relating in terms only to intrastate traffic, nevertheless, as reasonably interpreted, either directly or by its necessary operation burdens interstate commerce, such a statute is void.

The *Employers' Liability Cases*, 207 U. S. 463 (cited by appellees on pages 69 and 70 of their brief) are not in point, because there is no doubt that in cases where interstate traffic is affected (as where both interstate traffic and intrastate traffic are carried on the same train) the authority of Congress would apply. It was only because the act, in terms, covered intrastate traffic which

did not extend to or affect other States, and with which it was not necessary to interfere in order to exercise any of the general powers of Government, that it was declared unconstitutional. The necessity for a uniform rule of regulation in cases where both interstate traffic and intrastate traffic are concerned, and the consequent exclusiveness of the jurisdiction of Congress, is announced in the recent opinion of this court in the case of *Southern R'y Co.* v. *United States*, 222 U. S. 20, with reference to the application of the Federal Safety Appliance Acts. As was indicated in our original brief (p. 186), the opinion in the *Employers' Liability Cases* reiterates the principles announced in *Gibbons v. Ogden*, upon which principles our proposition is firmly established. In the *Employers' Liability Cases* this court said (p. 493), with reference to the opinion of Mr. Chief Justice Marshall in *Gibbons v. Ogden:*

> Accepting, as we do now, and as has always been done, this comprehensive statement of the power of Congress, we adopt and reiterate the perspicuous statement made in the same case (p. 194), of those matters of State control which are not embraced in the grant of authority to Congress to regulate commerce.

The case of *New York, ex rel. Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21 (cited by appellees on page 70 of their brief), is not in point, because in that case there existed a separation between the transportation service wholly within the State and that between the States, and the intrastate traffic under consideration did not extend to or affect other States. In this case a separation of the interstate traffic and intrastate traffic is impossible, and

the attempted regulation of intrastate rates necessarily extends to and affects other States.

The case of *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17 (cited by appellees on page 71 of their brief) was decided by a bare majority of this court, and, upon the principles as decided, is not applicable in this case. That case turned upon a regulation of commerce effected by Congress in the Wilson Act. And in that case the court quoted with approval (p. 24) the statement *In Re Rahrer* 140 U. S. 545, 562:

> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

In short, the decision was clearly pitched upon the point that the Wilson Act effected a divestment or separation of interstate commerce, and the Malt Liquor Inspection Law of Missouri was held to be constitutional, therefore, merely because it was held not to extend to or affect the commerce of other States.

The argument which appellees make as to direct and indirect burdens merely amounts to saying that a State may do that indirectly which it is prohibited by the Constitution of the United States from doing directly. The mere statement of this absurdity refutes it. It is clear that where this court has referred to direct and indirect effects of State action in its decisions the word "indirectly" has been used in the sense of "incidentally," or "immaterially." This court has directly said (216 U. S. 1, 27) that if a State statute, reasonably interpreted,

either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted.

In view of the repeated declarations of this court that the genius and character of the Federal power over commerce require that its action be applied, not only to the external concerns of the Nation, but also to those internal concerns which *affect* the States generally; and that the power of the States is limited to that commerce which is completely within a particular State and which does not *affect* other States; and that the test of the validity of State statutes which attempt to regulate the rates of intrastate traffic is to be found in their *effect* upon commerce among the States; and that the Legislatures, neither by giving their enactments a particular name nor by the use of some form of words, can take away the duty of courts to consider the nature and *effect* of a State statute; and that in determining whether a statute does or does not burden interstate commerce the court will look beyond mere form and consider the *substance* of things; and that in whatever language a statute may be framed its purpose may be determined by its natural and reasonable *effect.* The contention raised by appellees on page 73 of their brief, that a State has power to regulate intrastate rates without regard to the *effect* of such regulation upon interstate commerce, is manifestly untenable.

Gibbons v. *Ogden,* 9 Wheat. 1, 195.
Southern R'y v. *King,* 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas,* 210 U. S. 217, 227.
Western Union Telegraph Co. v. *Kansas,* 216 U. S. 1, 27.

Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

It is not clear why appellees have cited, on page 74 of their brief, the case of *Houston & Texas Central Railroad Co.* v. *Mayes*, 201 U. S. 321. This case is simply one of many in which this court has held that attempted legislation by a State in the exercise of its alleged police power is void when its *effect* is substantially to burden interstate commerce. In this case, the court said (p. 331):

> Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature.

And just prior to the quotation made by appellees the court said, with reference to rules established by the States in the exercise of their police power (p. 328):

> Of course, such rules are inoperative if conflicting with regulations upon the same subject enacted by Congress, *and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed, and not amounting to a regulation of such commerce.* (Italics are ours.)

Appellees say (on page 74 of their brief) that this court has repeatedly held that the regulation of rates for transportation of goods wholly within a single State is a regulation of internal commerce, and that the fact that such regulation by the State affects interstate commerce

does not render it invalid. This statement, so far as it asserts that the regulation of traffic wholly within a single State which does not extend to or affect other States is a regulation of internal commerce, is true, but we emphatically deny that this court has ever held that the fact that such regulation by the State affects interstate commerce does not render it invalid. None of the citations made by appellees in support of the assertion here made by them establishes anything more than the right of a State to regulate its intrastate traffic which does not extend to or affect other States. Wherever the regulation has affected other States, the act of the State has been pronounced unconstitutional and void. Following the citation from the Farmers Loan & Trust Co. case (116 U. S. 307) made by appellees on page 75 of their brief, this court said in that case (pp. 334-335):

> While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in Cardwell v. Bridge Co., 113 U. S. 205, 210, 'when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the States.' *Under this rule nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic.* It is not enough to prevent the State from acting that the road in Mississippi is used in aid of interstate commerce. *Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the State as well as within.* (Italics are ours.)

In the case of *Louisville & Nashville Railroad Co.* v. *Kentucky*, 183 U. S. 503, cited by appellees on pages 75 and 76 of their brief, there was simply no interference shown by the Kentucky long and short haul regulation with the traffic of other States. However, under the interpretation of the same regulation which was contended for by the State, in the case of *Louisville & Nashville Railroad Co.* v. *Eubank*, 184 U. S. 27, there was shown an interference with interstate commerce, and the regulation was declared unconstitutional insofar as it extended to or affected the traffic of other States.

In *Northern Pacific Railway Co.* v. *North Dakota*, 216 U. S. 579 (cited by appellees on page 76 of their brief), the question of interference with interstate commerce was not considered by this court. This court did refer to this point as one of the grounds of decision in the Supreme Court of the State, but, as shown in the opinion of Mr. Justice Holmes (p. 580), the State court intimated its opinion that if the railroad was able to make a fair profit upon its whole business within the State it might be required to carry a particular commodity at cost, or possibly below, and it expressed its opinion so strongly that the counsel for the plaintiff in error treated that doctrine as the sole ground of decision. The question of interference with interstate commerce was, therefore, clearly not raised before this court.

The only inference to be drawn from appellees' citation of sundry other cases in which this question was not "suggested" is that as the point was not raised, the cases are not applicable and should not have been cited by appellees in their brief.

In the case of *Missouri, Kansas & Texas R'y* v. *Haber*, 169 U. S. 613, cited by appellees on page 79 of their

brief, no principle of law was established which relates to the case at bar. The court simply held in that case that the statute complained of did not in fact operate as a burden upon interstate commerce, and Mr. Justice Harlan said (p. 635):

> It is suggested that the statute is so drawn that the railway company would be liable even if it acted in good faith and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statute were thus interpreted, it might be—though upon that point we express no opinion—that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in Railroad Co. v. Husen. But we do not so construe the statute.

The citation of the case of *Lake Shore & Michigan Southern R. Co.* v. *Ohio*, 173 U. S. 285 (made by appellees on pages 79 and 80 of their brief), establishes nothing more than the right of a State to make police regulations where such regulations do not interfere with interstate commerce and do not extend to or affect other States. That a State may not make even such police regulations when they interfere with or burden interstate commerce, or extend to or affect the commerce of other States, has been so frequently decided by this court, and the principle is so well settled, that citation is unnecessary.

When appellees deny (p. 85 of their biref) that Con-

gress has the power to prohibit favors to intrastate shipments as against interstate shipments, they deny the authority which it was the very purpose of the commerce clause to confer, and they deny that principle which, more than any other cause, led to the adoption of the Constitution.

In our original brief (p. 179) we drew attention to the intolerable conditions which would exist if there were no authority to prevent unjust discriminations between interstate rates and intrastate rates as contended for by appellees on pages 87 and 88 of their brief, and we also there drew attention to the fallacy of measuring the power of the Nation by the Act to Regulate Commerce instead of by the Constitution of the United States. Appellees contend (p. 97 of their brief) that such injustices or inconveniences are merely the unavoidable effect of our dual form of government. The constitutional history of the United States shows that the avoidance of such inconvenience and injustice, and the purpose of committing such affairs to a single authority, was the chief reason leading to the adoption of the Constitution.

If, as contended by appellees (p. 100 of their brief), every regulation of intrastate rates must restrain the carrier to some extent in fixing interstate rates, then, indeed, it is true that there can be no regulation of intrastate rates by the State, and it is also, indeed, true that the regulation of intrastate rates on interstate railroads by a State is no longer feasible, and all rate regulation affecting interstate railroads must be national.

This does not mean that all local regulation of interstate carriers must cease. Wherever the subject, by reason of its local nature, does not seem to require a

uniform rule of regulation, or where it pertains solely to the internal commerce of a State and does not extend to or affect other States, the State may regulate; but when the laws of a State or the orders of its Commission relating to its intrastate commerce, by their necessary, or natural, or probable operation, have the effect substantially to burden interstate commerce, such laws or orders are beyond the powers of the State, are repugnant to the commerce clause of the Constitution, and are in conflict with the supreme law of the land.

The question is not, as indicated by appellees on pages 108 and 109 of their brief, one as between the interest of the traveling and shipping public on the one hand, and the interest of the carriers on the other, but is one of limitation of the powers of the States. The exclusive power given to Congress by the commerce clause is not a power exclusive of the interest of the traveling and shipping public, nor is it a power exclusive of the interest of the carriers. It is not a power limiting the *people* of the States; it is a power limiting the authority of the *States* themselves.

There is, in the determination of this question, no necessity for quibbling over the meaning of words or phrases used in separate decisions of this court. There is, in fact, no necessity for reference to any single decision. The matter must be determined upon principles and rules of law which have been conclusively established, and we submit that the four statements of fact which have been hereinabove set forth show the necessity for a uniform rule of regulation with respect to the RATES of interstate railroads, and our proposition is firmly established by the following broad principles and rules of law, which are beyond dispute:

D.

The Federal Power Over Commerce is Exclusive Whenever a Uniform Rule of Regulation is Required.

The power to regulate commerce *among* the States, not merely *between* the States, is granted by the Constitution to the Congress of the Nation. The power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

No State, either by virtue of its police power or under any other power, can constitutionally burden, restrict, or infringe upon this paramount power of Congress.

When the commerce sought to be affected is completely internal and does not extend to or affect other States, and when the subject from its local nature does not seem to require a uniform rule of regulation, the State may regulate; but where the subject is national in its character, and demands uniformity of regulation, Congress alone can legislate, and when Congress has not legislated it necessarily follows that the subject is to be free from all legislation whatever. The power delegated to Congress was the power to regulate commerce "*among the several States,*" *not among the people of the States.* The sole object of the adoption of this clause of the Constitution was to confer upon Congress the power to prevent such action *by the several States as might prefer their own commerce over that of other States.* To hold that the power over commerce which affects, directly or indirectly, more States than one is not exclusive of the power of the States, would be absolutely and totally contradictory and repugnant to the purpose of the grant.

When Congress has not legislated upon the subject, the courts will enforce the national power over commerce in accordance with that common law which obtains generally throughout the United States, and which operates upon all commercial transactions.

Gibbons v. *Ogden*, 9 Wheat. 1, 196, 224, 225, 231.
Cooley v. *Board*, 12 How. 299, 319.
State Freight Tax, 15 Wall. 232, 280.
Welton v. *Missouri*, 91 U. S. 275, 280-282.
Henderson v. *Mayor*, 92 U. S. 259, 272.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196, 203-204.
Northern Securities Co. v. *United States*, 193 U. S. 197, *Dissenting Opinion of White, J., the Chief Justice, Peckham and Holmes, JJ.*
The Federalist, No. 7.
The Federalist, No. 22.
Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S. 92, 100-101.
N. Y., N. H. & H. R. R. Co. v. *I. C. C.*, 200 U. S. 361, 391.
Passenger Cases, 7 How. 283, 399-400.

E.

The Federal Power Over Commerce is Exclusive Not Only With Respect to Interstate Traffic, But Also With Respect to Intrastate Traffic Which Extends to or Affects Other States.

The exclusive power of Congress over interstate commerce is generally admitted, but our opponents assume that while Congress has exclusive power over interstate commerce, the right to regulate intrastate commerce is reserved to the States. This assumption is entirely er-

roneous. The commerce reserved to the States is only that commerce which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

The power of Congress, whatever it may be, must be exercised within the territorial jurisdiction of the several States, and no mere territorial distinction will suffice to define the respective powers of the State and of the Nation. It is of the very essence and purpose of the grant that the Federal power over commerce is exclusive, not only with respect to interstate traffic, but also with respect to intrastate traffic which extends to or affects other States.

The power of Congress over Interstate commerce is exclusive.

The power of Congress over that part of intrastate traffic which extends to or affects other States is exclusive.

The State may regulate that intrastate traffic which is completely internal, which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government.

Rate regulation involves necessarily a determination of the three elements—property, expenses, and revenue. Before the State can regulate rates and affect the element of revenue on intrastate traffic, it must determine the amount of property devoted to intrastate traffic and the amount of expenses incurred in that traffic. On interstate railroads both the property used and the expenses incurred in the conduct of intrastate traffic are inseparably intermixed and interdependent with prop-

erty used and expenses incurred in conducting the interstate traffic. The property used and the expenses incurred in common must be distributed according to some arbitrary rule. In making such a rule, the two authorities, State and Federal, necessarily conflict, because what is added to the charge for the one kind of traffic must be deducted from the charge for the other kind of traffic, and the supreme power, the Federal, must prevail, and the State power must give way. The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the State law.

The determination of the elements of property and expenses is necessary for a judicial review. Congress alone having the power to distribute common property and common expenses between interstate traffic and intrastate traffic, if Congress has not prescribed the rule for distributing property and expenses between the two classes of traffic, there can be no judicial review of the rates established by a State legislature or a State railroad commission, and if the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the sufficiency of the rate, such a law is unconstitutional.

The State, being unable to determine two of the three elements necessary to be ascertained in order to regulate rates, is, with respect to interstate railroads, without power to affect the third element, the revenue, by any rate regulation whatsoever.

Neither the State nor the railway can be permitted to ignore the fact that an interstate railway is a carrier both for the State and for the Nation, and that, therefore, its charges must be fixed with reference to its performance of duties to others as well as to the particular customer, the State.

Gibbons v. *Ogden*, 9 Wheat. 1, 136, 195.
G. C. & S. F. R'y Co. v. *Hefley*, 158 U. S. 98, 103.
Ex parte Young, 209 U. S. 1, 47.

F.

The Test of the Validity of the State Regulation is to be Found in Its Effect Upon Commerce Among the States.

The genius and character of the Federal power over commerce require that its action be applied, not only to the external concerns of the Nation, but also to those internal concerns which affect the States generally. And, as the power of the States is limited, in that respect, to that commerce which is completely within a particular State and which does not extend to or affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government, it is evident that the test of the validity of State statutes or rules which attempt to regulate the rates of intrastate traffic is to be found in their *effect* upon commerce among the States.

The Legislatures, neither by giving their enactments a particular name nor by the use of some form of words, can take away the duty of the courts to consider the nature and effect of a State statute. If it bears upon

commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form; and, in determining whether a statute does or does not burden interstate commerce, this court will look beyond mere form and consider the substance of things. In whatever language a statute or regulation may be framed, its purpose must be determined by its natural and reasonable effect.

If the necessary effect is to interfere with or reduce interstate rates or revenues, or if the natural and reasonable effect is to reduce or destroy interstate traffic, the statutes or regulations are unconstitutional and void.

If the natural and reasonable effect of the statutes or regulations is to destroy commercial relationships for a long time existing in connection with commerce among the States, and to create discriminations with respect to such commerce, which it was the very purpose of the commerce clause to prevent, the statutes or regulations are unconstitutional and void.

If, by reason of the interdependence and indivisibility of interstate traffic and intrastate traffic carried by interstate railroads, it is impossible to regulate or adjust the one kind of traffic without regulating or adjusting the other kind of traffic, then State statutes or rules or orders which attempt to regulate the intrastate rates of interstate railroads are unconstitutional and void.

That the order of the State Railroad Commission complained of in this case is unconstitutional and void for all of these reasons clearly appears from the allegations of the pleadings, and the proof by affidavits in support thereof, as well as from the facts of which judicial notice will be taken by this court.

Gibbons v. *Ogden*, 9 Wheat. 1, 195.
Southern R'y v. *King*, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas*, 210 U. S. 217, 227.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.
Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

II.

MISLEADING OR ERRONEOUS STATEMENTS IN THE BRIEF FOR APPELLEES CORRECTED, AND CERTAIN ARGUMENTS THEREIN REFUTED.

1. The Quantity of the Commodities Covered by the Rates Complained of Shipped to Consignees Other Than Distillers.

Appellees' counsel on page 4 of their brief state it does not appear from the bill how the quantity of the commodities, covered by the rates complained of, shipped to consignees other than distillers, compares with the quantity of such commodities shipped to distillers, and that the affidavits filed by appellees in opposition to the motion for an interlocutory injunction show the quantity shipped to the former class at the several points of destination was inconsiderable, and that by such affidavits it further appears that there was evidence heard before the Commission showing that at one or more of those points distillers were the only persons receiving such commodities.

It must be borne in mind that consignees other than distillers at the sixteen points of destination named in the record all along, both prior to and after March 25, 1910, were charged and paid appellant's regular standard rates from Louisville, Covington, and Newport on the commodities in question, while the distillers were charged and paid prior to that date special rates thereon, which were considerably lower, but after that date distillers were put by appellant on the same plane of rates with all other consignees of said commod-

ities and required to pay appellant's regular standard rates, without regard to the use they were put to or without discrimination on that account.

It is true the affidavits of appellees show the distillers were the largest consumers of said commodities at those points, but appellees' counsel carefully refrain from referring to the affidavit of Traffic Manager Compton in support of the allegations of the bill, in which he expressly states (Tr. 52):

> The direct and immediate effect of said orders, if enforced, will be to compel said railroad company to transport said articles for any and all persons from and to the points named on basis of said distillers' rates, irrespectively of the uses to which said articles are to be applied; that there is now and will continue to be a considerable volume of traffic in said articles moving to and from the points specified; that *a large proportion of such movement is and will be devoted to uses other than the manufacture and shipment of whiskey*, and to the extent that said articles are not applied to the manufacture of whiskey said railroad company will be compelled to apply said distillers' rates thereon without receiving in any way, shape or form the considerations and benefits that induced it in the beginning and for a long time thereafter to give said rates to distillers, and that the difference between the revenue accruing on said articles on basis of said distillers' rates ordered to be applied thereto by said orders of the Railroad Commission *will amount to many thousands of dollars annually*, and to that extent constitute irrevocable loss of revenue to said railroad company.

2. Assertion of Appellees' Counsel that the Bill is Defective in Not Alleging Facts.

On pages 6-7 of their brief appellees claim the bill fails to make material averments; for example, it is said (p. 6):

> There is no allegation in the bill that the rates fixed are so *unreasonably low* as to deprive the complainant of its property *without compensation*, or that the rates are *confiscatory*, but merely that the rates fixed 'are unreasonably low and unjust.'

On page 50 of their brief appellees' counsel say:

> There is no direct allegation that the rates fixed by the Commission are *unreasonably low*, the only allegation to that effect being found in the statement that the carrier will be restricted to the rates fixed by the Commission, and 'although the same are unreasonably low and unjust, the complainant must either accept same with or without protest or act at its peril if it dares to charge or collect any higher rates.'

Again, apparently ignoring the plain and explicit averments of the bill and the first amended bill, appellees' counsel assert at page 51 of their brief:

> Facts and not merely legal conclusions must be alleged to overcome the presumption in favor of the rates fixed by the Commission. In the case at bar no facts are alleged in the bill to show either that the action of the Commission was unreasonable or that the rates fixed are unreasonably low, and not even an allegation of a legal conclusion that the action of the Commission was unreasonable, the only allegation as to that matter being 'although' the

rates fixed by the order complained of are unreasonably low the carrier can not exceed those rates if the order of the Commission goes into effect.

Paragraph XIII of the original bill is as follows (Tr. 21-22):

> Complainant states that its existing rates and charges in effect on its several lines in the State of Kentucky and applicable to its intrastate freight business, affecting the commodities named in said order between the points of origin and points of destination herein mentioned, instead of being extortionate, are not higher than is just and reasonable, whether considered with respect to the value of its property or investments used in the public service or devoted to such traffic, or with respect to the value of the services rendered to the shippers or public generally; and complainant states it has the lawful right, as inherent to its business as a common carrier of freight and passengers, to charge and receive for the services rendered by it in the State of Kentucky just and reasonable rates, which right to charge and receive such just and reasonable rates is a property right that neither the State of Kentucky nor any governmental agency thereof can take from it or interfere with; and complainant states that the Commission's orders, if permitted to be put in force, will deprive it of its said property right without due process of law in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

In Paragraph XX of the first amended bill, which appellees' counsel appear to have entirely overlooked, it is clearly and directly alleged that the rates complained of "are arbitrary, unjust, unreasonable, discriminatory,

and illegal because of the following *facts*, among other grounds, to-wit:" Then follow allegations containing ten separately numbered sets of facts, specifically and concisely stated, without inference or qualification, showing the reasons why said maximum rates prescribed by the Commission on corn, rye, barley, malt, and other articles are of the character alleged, No. 8 of which is as follows (Tr. 81, 82):

> The enforcement of said order will compel complainant to accept upon interstate as well as intrastate traffic rates which are unusually and unreasonably low, both in and of themselves and relatively, *and which will not yield to complainant a fair or reasonable compensation for the service performed, and will deprive complainant without due process of law of the fair and reasonable return, to which it is entitled to earn upon the value of the property it devotes to said service or the public use,* with respect to such intrastate traffic as well as to such interstate traffic, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

All these well pleaded facts were fully proven at the hearing by the supporting affidavits. (Compton's affidavit, Clause 8, Tr. 57-8; Goodwyn's affidavit, Clause 9, Tr. 64.)

These extracts from the bill as amended will be sufficient to demonstrate how misleading and unreliable are the statements quoted from the brief for appellees on this point.

3. Does the Record Show the Rates Prescribed by the Commission's order are arbitrary?

On page 53 of appellees' brief we find the following:

> It can not be said that the Commission exceeded its powers by acting *arbitrarily* or in bad faith, as there is *no allegation to that effect*. The mere allegation that the evidence heard bore no 'proper relation' to the question investigated is but a conclusion of law, and even if its truth should be established that fact would not invalidate the action of the Commission if that body in good faith believed that the evidence did show that the rates ought to be reduced.

The well pleaded facts in appellant's pleadings show the rates complained of are arbitrary, for, as alleged therein, and not denied by answer, but admitted on general demurrer thereto, they were prescribed by the Commission, *without any evidence*, proving or tending to prove appellant's existing standard rates were unjust, unreasonable, or extortionate, or that the former special distillers' rates adopted by the Commission are just or reasonable for the services performed.

It is true appellant does not expressly charge the Commission with bad faith, but it is charged that its action was arbitrary, because it was based on *no evidence* of the facts essential to jurisdiction or the exercise of its powers, conceding, for the sake of argument, the validity of the McChord Act, under which it proceeded. Appellees' counsel have stated, more than once in their brief,

> mere allegation that the evidence heard (before the Commission) bore no 'proper relation' to the question investigated is but a conclusion of law.

Speaking of the bill, they say, at page 6:

> It is alleged that the evidence introduced, before the Commission, bore no 'proper relation' to the justness or reasonableness of rates for transporting the commodities and supplies in question when to be used for distilling purposes, and that no evidence was introduced which tended to show what might be a just or reasonable rate on the commodities in question between the points named in the order of the Commission.

Appellees' counsel with avidity have seized upon this averment in the bill, and would have this court infer it was the only one bearing on that subject, and, if it is a mere conclusion of law, that the bill is insufficient to show arbitrary action by the Commission. It is found in the bill as follows (Tr. 20):

> This complainant states absolutely that the evidence that was adduced at said hearing and investigation had *no proper relation* to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes.

We may concede that the criticism leveled against this allegation is sound, and yet there are still abundant direct and positive averments of fact well pleaded in the bill which, being admitted on demurrer, conclusively establish the proposition that the Commission exceeded its powers and the rates complained of were arbitrarily

prescribed by that body. In the same sentence, immediately following the language last quoted, it is alleged in the bill (Tr. 20):

> and it states that *no evidence whatsoever* was adduced at the hearing or investigation aforesaid which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for *all* purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and investigation aforementioned, and its said orders thereon were and are null and void.

Still further the bill contains these unequivocal averments:

> There was *no testimony* by any of said witnesses that did establish or that tended to establish the unjust or unreasonable nature of any of the rates that became effective on the lines of railroad of complainant on March 25, 1910, and that have been charged, collected, and received by it for such service of transportation on the commodities named on and subsequent to said date, and *no evidence* was adduced in said proceedings that established or tended to establish the unjust or unreasonable nature of said rates or of any of them, or that said rates or any of them were or are extortionate. (Tr. 15, 16.)

Again the bill charges:

> There was *no evidence* introduced in said investigation or considered by said Commission showing or tending to show that this complainant's rates on any of the commodities hereinabove named on any of its lines in Kentucky, or between the points of origin and of destination aforementioned, were in and of themselves unjust, unreasonoble, or extortionate. (Tr. 19.)

4. The Record Shows the Commission Exceeded Its Powers and Jurisdiction and the Orders Complained of are Void, Within the Doctrine Announced in Southern Pacific Co. v. Interstate Commerce Commission (Willamette Valley Case), 219 U. S. 43.

This court in the Willamette Valley case, involving a state of facts very similar to those shown in the case at bar, and where the powers of the Interstate Commerce Commission over interstate rates under the Act to Regulate Commerce are substantially the same as those of the Kentucky Railroad Commission over intrastate rates, under the McChord Act (assuming the latter Act, for the sake of the comparison, to be valid), decided, as the syllabi shows, the following propositions:

> 1. An order of the Interstate Commerce Commission, made in consequence of assumption of powers not possessed by it, is void, and its enforcement should be restrained by the courts.
>
> 2. The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it can not substitute for a just and reasonable rate, a lower rate, either on the ground of policy

or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate.

3. Where the shippers do not complain of a new and higher rate because it is intrinsically an unreasonable one, but because, although reasonable, the railroads are estopped to advance it on account of having maintained the lower rate for a considerable period, it is beyond the power of the Commission to direct a restoration of the old rate; and so *held* in regard to the Willamette Valley lumber rates.

4. Where the Commission makes an order restoring a rate that shows on its face it was made on the ground that the railroad was estopped to increase it, the order will not be presumed to have been made for the purpose of establishing a reasonable rate, if it excludes a section from the benefit of the restored rate which amounts to a discrimination against that section.

The suit decided February 20, 1911 (after the orders of the Kentucky Railroad Commission of August 10, 1910, and the order of the lower court of January 12, 1911, herein appealed from, were entered), was brought by the Southern Pacific Company in the Circuit Court of the United States for the Northern District of California to enjoin the enforcement of an order of the Interstate Commerce Commission fixing a rate on lumber in carload lots from Willamette Valley points to San Francisco, the original rate of $3.10, after being in force about nine years, having been increased to $5.00 per ton by the railway carriers from said points and the city of Portland, Oregon. In the complaint before the Commission it was charged by the lumber manufacturers that the increased rate was unreasonable in and of itself;

that from about 1898 there had existed a rate of $3.10 for carrying lumber between the points named, and that upon the faith of this rate and the belief that it would not be changed, large amounts of capital had been invested in lumber mills in the Willamette Valley; that the people in that valley were dependent upon the lumber industry, which would be destroyed and the population would be detrimentally affected if the new rate of $5.00 per ton was continued to be charged. It was also alleged that the $3.10 rate was reasonable in and of itself, and it had been increased, without just cause, upon the theory that the lumber interest in the Willamette Valley was prosperous, and the traffic could, therefore, stand the increase. The railroad companies set up the reasonableness of the $5.00 rate; that the $3.10 rate was unreasonably low and had been fixed solely for the purpose of enabling lumber from the Williamette Valley to reach a market in San Francisco and bay points, which it could not have done if a just and reasonable rate had been exacted. The Commission's order prescribed as a proper rate from certain points in said valley $3.40 and from the remaining points therein $3.65, while the rate from Portland was left as it was at $5.00, although some of the points covered by the order were within a few miles of that city, which was not given the benefit of the reduction. (14 I. C. C. Rep. 61.) The vital question dealt with in the course of this court's opinion in that case was whether the Commission had assumed the power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to sub-

stitute for a just and reasonable rate one which in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive just and reasonable compensation for the service rendered. In answering that question this court held, in substance, that the subject-matter of the complaint of the lumber men was not the intrinsic unreasonableness of the new rate substituted by the railroad companies for the former rate, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just. This court also held that, while the Commission's opinion contained some sentences which, when segregated from their context, might give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, nevertheless, when the opinion was considered as a whole, in the light of the condition of the record, it clearly resulted that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate which had prevailed for sometime to a just and reasonable charge for the service rendered for the future, and this view of the nature and character of the power exerted by the Commission was supported

by the syllabi to the official report of the Commission's opinion, copied in the margin of this court's opinion at page 450.

Furthermore, the exclusion of Portland by the Commission from the benefit of the reduced rate served to show as this court held, the character of the power assumed by that body, and prevented the possibility of holding that it was merely the exercise of the right to correct an unjust and unreasonable rate, because, if the assumption were indulged that the order was but the manifestation of the authority to correct an unreasonable rate, the traffic of Portland, in the absence of some lawful reason for excluding it, would be discriminated against by the order excluding that city from the benefit of the reduced rate. On that point this court observed (pp. 450-51.):

> We can not, therefore, assume that the order was legal because it rests upon the power to correct an unreasonable and to substitute a reasonable rate, since to indulge in that assumption would at once beget the inevitable inference that the order was repugnant to the statute because of its discriminatory character.

Now, let us examine the record in the case at bar for the "ear-marks" which bring it within the rulings of this court in that case. The record shows that the special rates on corn, rye, barley, malt, and other articles, to distillers whose distilleries were located at interior points in Kentucky were originally accorded by appellant as far back as 1874, to such distillers as a means of promoting, encouraging, and increasing the manufacture of whiskey and the shipment of the same over

appellant's lines in Kentucky (Compton, Tr., pp. 45-6); that the concessions represented by these special rates on distillers' supplies were first granted at a time when the distilling industry upon said lines was in a demoralized and precarious condition, because of the competition with the manufacturers of cheap whiskey, blenders and rectifiers located on and north of the Ohio River, said industry being carried on at small country points where primarily an abundant supply of pure water could be relied upon, and where it was expected the surrounding farms would furnish some portion of the grain necessary for distilling purposes, and where immunity from city taxes and other expenses incidental to manufacturing within the cities would tend to minimize the cost of production. In the course of time, however, the inroads of the competition referred to, coupled with failure of grain crops, drouths, and other unforseen happenings, placed said country distillers at a material disadvantage, so they were frequently compelled to bring in from distant points grain, water, fuel, and supplies of all kinds, the transportation charges upon which added materially to the cost of their product. The few distillers who were making high grade special brands were not materially affected, but the majority, who were turning out the ordinary grades, found their markets being gradually closed to them by reason of the high cost of their supplies, and the competition mentioned. (Ib. 49-50.) In this situation, appellant, finding itself about to be deprived of the whisky traffic, which it had, as a matter of business policy, labored to build up and maintain, made common cause with the distillers on its lines, and voluntarily gave to them an unusually low scale of rates

on their grain and supplies in the expectation and assurance that they would be withdrawn whenever the conditions changed for the better. For these reasons appellant never guaranteed said rates or promised to protect them beyond the end of the current distilling season, and invariably thereafter said rates were restored, revised, and modified, from season to season, as existing conditions seemed to require. As a result of this co-operative action, the distilling industry upon appellant's lines in Kentucky gradually recovered its footing, and at the time this suit was instituted there were and still are forty-eight (48) of these country stations on its lines in that State at which distilleries are located, the names of which are stated in Traffic Manager Compton's affidavit. (Tr. 51-2.)

The disadvantages under which said industry labored in the beginning and for many years thereafter have entirely disappeared, and it is not only no longer in need of the special rates, which, under the conditions then existing, appellant gladly gave, but in the past few years enormous fortunes have been made from the distilling industry along appellant's lines in Kentucky, and there is no longer any reason or justification for extending thereto lower rates on any commodities necessary in the manufacture and shipment of whiskey than the standard rates of appellant, as applied to the same commodities when intended for and devoted to other uses. During the time said special rates were in effect appellant was influenced solely by the representations of said distilling interests that without such assistance the distilleries could not be kept in operation, and by the knowledge that their closing down would take away from appellant a large and fairly profitable traffic *in the trans-*

portation of whiskey from said distilleries to the markets of consumption, but it was never contemplated or expected that said special rates would be perpetuated or even extended beyond the end of the current season, which the rate-making order of the Commission, if enforced, would accomplish. (Compton, Tr. 50-51, Goodwyn, Tr. 59-60.)

An examination of the complaint before the Commission of the twenty-three (23) corporate distillers at sixteen (16) out of forty-eight (48) of the distillery stations is important in this connection. After setting out the fact that appellant had "for *many years* prior to March 25, 1910," transported over its lines the various commodities and at the rates shown in Exhibit A, with their complaint, and the increased rates, designated as new rates in said Exhibit, we find in said complaint these allegations (Tr. 33):

> Plaintiffs say that each and all of said increased rates so charged, collected, and received from said points of origin to the respective plants of each of the plaintiffs, as shown in said Exhibit, *wherein the same are in excess of said former rates,* are extortionate, unjust, and unreasonable.

Then immediately follows the statement of their only reason or ground for alleging the increased rates "are extortionate, unjust, and unreasonable," as follows:

> That defendant as aforesaid *had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants, upon the faith of said former rates, and had maintained said former rates for many years, as just and reasonable rates,* all of which were and are

> fairly remunerative, and are and were *no more* than just and reasonable compensation for the transportation of said commodities to and from said points.

To the last proposition, that the special rates referred to were "no more" than just and reasonable compensation for the transportation of said commodities, we quite agree with the distillery corporations that filed said complaint. Our contention is that said special rates were much *less* than such compensation at the time they were increased by appellant.

Now, what is the prayer in the complaint of said corporate distillers? It is as follows (Tr. 33):

> Wherefore, plaintiffs pray that this Honorable Commission, after due notice herein and investigation, make and fix just and reasonable rates to and from all points and upon all commodities as shown in said Exhibit A, *and that said rates be fixed no higher than those charged, collected, and received by the defendant for the transportation of said commodities to and from said points prior to the cancelation of said former rates effective March 25, 1910, as hereinbefore stated;* and plaintiffs pray for all other necessary orders in the premises.

Thus, it appears that the *gravamen* of said complaint was the supposed equitable estoppel urged against appellant's right to increase or withdraw its said special rates on distillers' supplies, and in lieu thereof to put in its regular standard rates charged, collected, and received from all consignees alike, which were not alleged to be unjust or unreasonable for any other reason or upon any other ground than the one expressly stated in said complaint, viz.:

> That defendant had induced plaintiffs and each of them to expend large sums of money in the erection of and in addition to their several plants upon the faith of said former rates.

Appellant's answer traversed the averments of said complaint, relying upon an equitable estoppel, and thereby made up the material and controlling issue to be tried and determined by the Commission. (Tr. 34-5.)

The vital question before the Commission, therefore, was not whether the existing rates were unjust or unreasonable in and of themselves, but whether appellant was equitably estopped from increasing its former special rates, and on that ground should be compelled to restore such special rates.

It is interesting and instructive in this connection to note what the three Federal Judges in the court below, after a critical and close examination of the record, held to be the issues presented to the Commission. On this point in their opinion they state (Tr. 89):

> Plainly the issues before the Commission involved the question whether the rates, which had for years prior to March 25, 1910, been charged for the carriage of distillers' supplies and products within the State of Kentucky, *should be restored*, and whether the difference between those rates and the rates which had been put into effect March 25, 1910, and thereafter exacted down to the filing of the petition before the Railroad Commission, was recoverable as reparation.

Further along the court below, speaking of the rates which the Commission by its order restored, said (Tr. 90):

As we understand these rates, they are the same as the rates that were prior to March 25, 1910, charged for the carriage of distillers' supplies and products, but that they are by the order extended *to all shippers* of like packages and commodities between the points and along the lines named, without regard to the occupations of the shippers; whereas, the rates put in force by the railroad company on and after March 25, 1910, were the same as those previously exacted of shippers between said points on said lines who were *not* engaged as distillers. In other words, the uniform standard of rates as fixed by the railroad company on March 25, 1910, was that previously charged to *non-distillers*, while the uniform standard fixed on August 10, 1910, by the Railroad Commission was the one existing prior to March 25, 1910, *in favor of distillers.*

The Commission delivered no opinion stating the *facts* on which its conclusions were reached, but in its orders of August 10, 1910, merely recited the steps taken in the proceeding instituted by the distillery corporations against appellant, declared it was of opinion the existing rates of appellant "are extortionate, unjust, and unreasonable," and fixed the same rates in force prior to March 25, 1910, stating it was of opinion they "are just and reasonable." (Tr. 27-31.)

We have already seen that the Commission, by its general demurrer to the bill as amended, alleging that *no evidence* was introduced before the Commission to prove or tending to prove the new or existing rates were unjust or unreasonable, or that the old or former special rates were just or reasonable for the service performed, have *admitted* that no such evidence was intoduced or heard by them, and starting with this important admis-

sion (which is equivalent to a confession that the rates complained of were *arbitrarily* fixed by them), we have not far to go, nor is the search difficult, to find the true ground on which their orders were made.

It is found in the counter-affidavits filed by appellees in opposition to the motion for an interlocutory injunction. In those of appellees, Siler and Finn, which are alike in all substantial respects, if not in every respect, the only statement of *fact* stated by them to have been shown in the proceeding before the Commission, is as follows (Tr. 66 and 67, 68):

> Affiant further states that the uncontradicted evidence showed that the rates of which the complainants were complaining had been in force *only a short time*, and that prior to the time those rates were put in force plaintiff had *for a number of years* been collecting from the complainants *no greater rates* than those herein complained of.

If there had been any other *facts* bearing upon the question of reasonableness, it is reasonable to assume that these Commissioners would have stated them in their affidavits, carefully drawn by their counsel and filed within three weeks after the bringing of this suit by appellant. But this court has held that "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." (*Interstate Commerce Commission* v. *Chicago Great Western R'y Co.*, 209 U. S. 119-20.) Again appellees, Siler and Finn, in their affidavits, shed some more light on this subject by stating (Tr. 66 and 68):

> The evidence did not show that the conditions which existed at the time of the hearing of said com-

> plaint differed from the conditions which existed during the years when plaintiff *voluntarily* charged and collected from the complainants the rates fixed by said Commission of which complainant is now complaining.

The fact that a carrier has even voluntarily put in a low or reduced rate

> furnishes no criterion for the measurement of the power of a Legislature (or Commission, we may add) * * * *Nor does it furnish a standard by which to measure the reasonableness of the matter enacted by the Legislature.* The action of the company upon its own volition, *purely as a matter of internal administration, and in regard to the details of its business*, which it has the right to change at any moment, furnishes *no argument* for the existence of a power in the Legislature to pass a statute in relation to the same business imposing additional burdens upon the company. (*Lake Shore & M. S. R'y Co.* v. *Smith*, 173 U. S. 684, 697.)

So, W. A. Miller and R. H. Edelen, officers respectively of two of the distillery corporations in the proceeding before the Commission, present another pair of twin affidavits, drawn by their own as well as appellees' counsel and state what they deemed material, and doubtless what their testimony had been as witnesses in said proceeding, which controlled and induced the action of the Commission therein, as follows (Tr. 70, 71, 72):

> The rates as fixed by said Commission, by the orders aforesaid, had *for many years* prior to March 25, 1910, been in effect on all shipments of the commodities mentioned in said orders to and from dis-

tilleries located at the points named in said orders.
* * *

That if the Louisville & Nashville Railroad Company is permitted to continue in effect the increased rates between the points mentioned in the aforesaid orders of the Kentucky Railroad Commission, established by it on March 25, 1910, on the commodities used and shipped by distillers, *that all the distilleries located at said points will be put to a great disadvantage in competing with distilleries located on other lines of railroad; that some of the distilleries located at said points will have to be dismantled and abandoned, and that the value of all of said distilleries will be largely depreciated.*

Not a hint in any of these four affidavits is given of any evidence before the Commission showing or tending to show the new or standard rates were in and of themselves unreasonable, or that the old or special rates were reasonable for the service rendered or to be rendered by appellant. On the contrary, every material statement therein bearing on the character of the existing rates as compared with the former rates goes to support the equitable estoppel relied on in the complaint of the distillery corporations, and sustains our contention that the Commission exceeded its powers under the McChord Act (assuming that Act to be valid), and its orders are, therefore, void.

Moreover, the parallel between the case at bar and the Williamette Valley case may be carried further, when we consider the discriminations and preferences (in violation of Sections 817 and 818, Kentucky Statutes and Sections 2 and 3 of the Act to Regulate Commerce) established by the Comimssion's orders against the dis-

tillers whose distilleries are located at the other thirty-two (32) interior stations on appellant's lines in Kentucky, which we discussed in our original brief and illustrated by the map attached thereto. (Part IX, pp. 139-148.) These other distillery points occupy relatively the same attitude as the city of Portland, whose lumber men were discriminated against in the Willamette Valley case. Indeed, many of them, as shown on said map, are much nearer Louisville, Covington, and Newport, respectively, than the points to which the reduced rates apply, yet they were not given the benefit of them, but left to continue paying appellant's standard rates. The excuse can not be offered by appellees that such gross discrimination, in contravention of the State and Federal Statutes, resulted from the fact that the distillers at the stations discriminated against filed no complaints, for the McChord Act, under which the Commission proceeded, plainly provides:

> When said Commission shall receive information or have reason to believe that such (extortionate) rate or rates are being charged, collected, or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible.

The statute requires the Commission to proceed in the same manner where there is no complaint, as where there is one filed. Appellees' counsel admit in their brief (bottom of page 41) "the Commission is not restricted to the reduction of rates upon complaint." All that is necessary is for it "to receive information or have reason to believe." If appellant's standard rates on distillers' supplies from the three (3) points of origin to

the sixteen (16) points of destination named in the proceeding instituted by the Greenbrier Distillery Company and others were in truth and in fact held to be extortionate or unreasonable, they were likewise extortionate or unreasonable from the same points of origin to all the other thirty-two (32) distillery stations in the interior of Kentucky; and the Commission necessarily received information to that effect in the investigation and hearing of that proceeding, or had reason to so believe, *provided there was any evidence to prove or tending to prove appellant's said standard or existing rates from the points to the points involved therein were extortionate or unreasonable.* The fact that the Commission did *not* discharge its statutory duty and extend its order restoring said special rates on distillers' supplies to two-thirds of the distillery stations on appellant's lines in the interior of Kentucky shows conclusively there was no evidence introduced or heard by that body in said proceeding proving or tending to prove appellant's existing or standard rates were extortionate or unreasonable; and it did not, therefore, "receive information" therein that they were extortionate or unreasonable, or have "reason to so believe." So we are forced to the conclusion that its action was based on some other ground, viz.: That appellant was estopped to advance its special rates by reason of the evidence that was actually introduced and heard by the Commission, showing the facts and circumstances under which said special rates were originally put in and kept in force by appellant for many years, and the hardship that might result to the plaintiffs in the proceeding aforesaid by reason of such advance. In other words, the Commission assumed

powers not possessed by it, and its rate-making order is, therefore, void; and its enforcement should be restrained, just as was done by this court, where the Interstate Commerce Commission assumed to exercise similar powers, under like circumstances, in the Willamette Valley case.

5. The Nature of the Hearing to Which a Carrier is Entitled With Respect to the Reasonableness of Rates Prescribed for Its Future Services Under the Decision of this Court in Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota, 134 U. S. 418.

Appellees' counsel in their brief (pp. 17-36) make a labored, but we think futile, effort to establish the proposition that this court in the case of *Chicago, Milwaukee & St. Paul R'y Co.*, v. *Minnesota*, 134 U. S. 418, only intended to decide that the carrier was entitled to a hearing of some kind at some stage of the proceeding to fix its rates, and did not hold it must be afforded a *judicial* hearing upon the question of the reasonableness of the rates prescribed for its services. We referred to and discussed the facts and decision in that case in our original brief (pp. 88-90; 93-94).

Appellees' counsel in their brief (p. 17), speaking of that case, say:

> The State court had held that, although the rates had been fixed *without a hearing*, there could be no judicial inquiry as to the reasonableness of the rates, even though they might be confiscatory.

Again they state at page 26 of their brief:

> In the Minnesota case the Supreme Court of that State had precluded all judicial inquiry as to whether or not the rates were *confiscatory*, and this court was forced to hold that the Statute, as thus construed, was void, there having been *no hearing* before the rates were fixed.

Now, in point of fact, the rates on milk in the Minnesota case had *not* been fixed "without a hearing," such as appellees' counsel appear to admit was essential to their validity, where a judicial hearing is unprovided for. On an examination of the elaborate statement of that case by Mr. Justice Blatchford, it appears that a statement of the complaint of the Board of Trade Union of certain towns in Minnesota filed before the Commission was first forwarded by the Commission to the railway company, which was called on to satisfy or answer it, and the railway company's Assistant General Manager responded thereto in writing. Thereafter on the day fixed for the hearing the railway's authorized attorney appeared at the office of the Commission in St. Paul; the Commission then proceeded to investigate the complaint; and found the railway company's rates for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were 3 cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that a rate of 2½ cents per gallon in ten-gallon cans was an equal and reasonable rate for such services. So, a hearing before the Commission was in fact afforded the carrier in that case.

In response to the alternative writ of mandamus, issued by the Supreme Court of Minnesota to enforce the order of the Commission, the railway company urged that the rate of 3 cents was a reasonable, fair, and just

rate; that the rate of 2½ cents was not a reasonable, fair, or just compensation for the service rendered; and that the establishing of such rate by the Commission was *pro tanto* a taking of its property without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States. When the case came on for hearing in the State Supreme Court, the railway company applied for a reference to take testimony on the issue thus raised as to whether the rate fixed by the Commission was reasonable, fair, and just, which reference was denied by that court, and a judgment was thereupon entered directing compliance with the Commission's order, which was held to be final and conclusive, as to the justness and reasonableness of the rates prescribed thereby. In other words, the State Supreme Court held the railway company was not entitled to a judicial inquiry as to the reasonableness of such rates, under the terms of the State Statute, which, so construed, this court on writ of error held to be in conflict with the Constitution of the United States, as depriving the railway company of its property without due process of law, and denying to it the equal protection of the laws.

This court will notice that the railway company's response in the Minnesota case was very general in its averments that the rate it was charging was fair, just, and reasonable, and that the Commission's rate was unjust and unreasonable, without stating specific facts, as appellant has in the case at bar, yet this court held said response to be sufficient to raise the material issues.

In that case the State Supreme Court construed the statute of Minnesota precisely as we, as well as counsel for appellees in the case at bar, insist this court should

construe the provisions of the McChord Act, as follows: (38 Minn. 281, 134 U. S. 452):

> It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the Commission (assuming that they have proceeded in the manner pointed out by the Act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the Act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the Commission. Indeed, the language of the Act is so plain on that point that argument can add nothing to its force.

This court will observe in that case the counsel for the plaintiff in error contended, as we do here (Ib. 446):

> The court erred in holding that the schedules of rates fixed by said Commission were final and conclusive as to what were lawful, equal and reasonable rates, and that they 'are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable', instead of simply holding them as advisory and *prima facie* or presumptively equal, and subject to review by the court.

It will be noticed also that counsel for the defendant in error in that case argued for the validity of the statute, as do appellees' counsel here, as follows (Ib. 447):

> It will relieve the discussion of this case from some embarrassment, if it is borne in mind that, in the case made by plaintiff in error to the alternative writ, no allegations are made that the enforcing the rate established by the board would so affect the earnings of the road as to impair its ability to meet any of its obligations or to seriously affect its revenues.
>
> Neither is it claimed by plaintiff in error that it is protected by an express contract or charter exemption from legislative interference in the matter of fixing rates, the company contenting itself as above stated, with the allegation that the Commission 'unjustly, unreasonably and oppressively' fixed the rate, and that the establishment of such rate was a *pro tanto* taking of the property of the plaintiff in error.

The Minnesota statute was held by this court to be void, because it attempted, as construed by the State Supreme Court, to make the rate-making order of the Commission, a non-judicial body, *final and conclusive* on the question of the *reasonableness* of the rates prescribed for the service rendered, not on a question of *confiscation*. The rate fixed by such a Commission does not have to be so low as to amount to confiscation, as contended by appellees' counsel (at page 21 of their brief), before the carrier becomes entitled to a judicial inquiry. The right of the carrier to a judicial inquiry on the question of the reasonableness of rates prescribed by a Commission is guaranteed by the Federal Constitution, not-

withstanding a hearing in fact was accorded the carrier before the Commission fixed and promulgated the rates complained of in that case.

In the late case of *Ex parte Young*, 209 U. S., at page 147, this court reaffirmed the foregoing doctrine, as follows:

> If the law be such as to make the decision of the Legislature or of a Commission *conclusive* as to the *sufficiency* of the rates, this court has held such a law to be unconstitutional. *Chicago, etc., Railway Co.* v. *Minnesota*, 134 U. S. 418.

The court's attention, in this connection, is called to the opinion of circuit judge, now Mr. Justice McKenna, in *Southern Pacific Co.* v. *Board of Railroad Commissioners of California*, 78 Fed. 236; and to the opinion of district judge, now circuit judge, Hook, in *Western Union Tel. Co.* v. *Myatt, State Solicitor, et al.*, 98 Fed. 335, both of which fully sustain our contention that the rate orders of the Kentucky Railroad Commission can not be lawfully made final and conclusive or beyond judicial review upon the question of the reasonableness of the rates prescribed thereby.

In the first of these cases the provision of the Constitution of California making the rates fixed by the Board of Railroad Commissioners conclusively just and reasonable was held to be in conflict with the Fourteenth Amendment to the Constitution of the United States and void; and in the second case the Act of the Kansas Legislature creating the Court of Visitation was held to be invalid under the Constitution of that State, in so far as it attempted to confer on that body judicial powers in re-

spect of the same matters of which it was given legislative and administrative jurisdiction, and that a proceeding before that so-called court, in which it was sought to secure a judgment on the reasonableness of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the Federal Constitution.

In the cases of *Interstate Commerce Commission* v. *Union Pacific Railroad Company, et al.*, decided by this court January 9, 1912, Mr. Justice Lamar delivering the opinion, the limitations upon the finality of the orders of the Interstate Commerce Commission, and the instances wherein such orders had so far been held to be subject to judicial review, were stated as follows:

> There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final, unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved had been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*,

215 U. S. 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 544; *Int. Com. Com.* v. *Alabama Midland*, 168 U. S. 146, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

Were we to concede that the McChord Act is valid and that the rate-making orders of the Kentucky Railroad Commission thereunder are final, unless they come within one or more of the exceptions defined by this court in those cases, with respect to the orders of the Interstate Commerce Commission, still the orders herein complained of clearly come within all of these exceptions, save perhaps the fourth, and are, therefore, subject to judicial inquiry.

Besides under the doctrine laid down by this court in *Louisiana R. R. Commission* v. *Cumberland Telephone Co.*, 212 U. S. 414, 420, appellant is not confined to the Federal questions involved herein, but, under the aver-

ents of the bill, claims the right to have the question of the *reasonableness* of the rates complained of inquired into by this court, as appellant, by the laws of the State of Kentucky, is entitled to just and reasonable compensation for the service it performs as a common carrier. (Original brief, pp. 94-95.)

6. The Contention of Appellees' Counsel that the Kentucky Railroad Commission Possesses Judicial Powers is Untenable.

Appellees' counsel, to sustain the finality of the rate-making orders of the Kentucky Railroad Commission claimed by them, are driven in their brief (pp. 42-46) to the contention that said Commission is vested with judicial powers. They say this was done by Section 218 of the State Constitution, where the Commission is granted specific power to relieve railroad carriers from the operation of the long and short haul provision of that section, but we think we have demonstrated in our original brief (pp. 48-52) under the authorities there cited that such power is *not judicial*, but purely *executive* or *administrative*. On this point we cite an additional case, recently decided by this court, viz.: *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

But it is further said by appellees' counsel (brief, p. 44) that the State Constitution (Section 209) provides that the powers of the Commission shall be regulated by law, and that until otherwise provided by law it should have the same powers and jurisdiction prescribed and allowed by law to the then existing Railroad Commission. It is then claimed (brief, pp. 45, 46) that prior to the adoption of the present Constitution (September 28,

1891), the latter Commission had the same power to award reparation to shippers the present Commission has (which is none at all, as we think we have shown in our original brief, Part VIII, pp. 123-138); and that "prior to that time it had had the authority to make such an award with the force and effect of a judgment," citing Gen. Stats., Ed. 1888, p. 1028.

Now, the Statute of 1888 referred to did give the former Railroad Commission, in the hearing and determination of complaints against a railroad company for extortion and discrimination, authority to "award judgment," but it was therein expressly provided that such awards should be filed with the clerk of the circuit court in the proper county, and that any party dissatisfied therewith might file a traverse thereof with such clerk, who was required to docket the same for trial in that court, with the right of such party to a jury if the amount exceeded twenty dollars. So, in point of fact, the power conferred was not judicial, but administrative, just as is the like power vested in the Interstate Commerce Commission to make awards of damages for reparation, which are subject to judicial review and enforcible by the courts. (Section 16, Act to Regulate Commerce, as amended June 18, 1910.) Nor can the provision referred to in Section 209 of the State Constitution of 1891, viz.: "the powers and duties of the Railroad Commissioners shall be regulated by law," be depended upon to support the proposition that the present Commission has been lawfully vested by the Legislature with judicial power, for Sections 27, 28, 109, and 135 of the same instrument stand as insurmountable barriers to such a construction. (Appellant's original brief, p. 7.)

By Section 28, it is declared:

> No person or collection of persons being of one of those departments (legislative, executive, and judicial) shall exercise *any power* properly belonging to either of the others, except in the instances hereinafter *expressly* directed or permitted.

It is not pretended by appellees' counsel that the Legislature is by Section 209 "*expressly* directed or permitted" to confer upon the Railroad Commission, an executive or administrative body, judicial power. Furthermore, by Section 109 of the Constitution, "the *judicial power* of the Commonwealth, both as to matters of law and equity" (that is, all of such power) is vested in certain *named courts*, and by Section 135 thereof the door is absolutely closed against the Legislature creating any other courts in this language:

> No courts, save those provided for in this Constitution, shall be established.

But, as decided in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, even if the Commission possessed judicial powers, as well as legislative powers, under the State Constitution, the making of a rate, being a legislative Act, by such a Commission, after hearing the interested parties, is not final and conclusive or *res judicata* upon the validity of the rate, when questioned by those parties in a suit in court. Mr. Justice Holmes, delivering the opinion of a majority of the court in the Prentis case, said (*Ib.* 227):

> It does not matter what inquiries may have been made as a preliminary to the legislative act. Most

legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * So when the final act is legislative the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a State Constitution should provide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States.

7. **Nature of the Action of the Courts, Were an Appeal Allowed, Under the McChord Act, From a Rate-making Order of the Commission.**

Appellees' counsel in their brief say (p. 23):

> If, however, a right of appeal to the courts were given, the action of the courts upon the appeal would be legislative merely, as held in *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, and as the railroads have no constitutional right to legislative action by the courts, they can not complain that no such right of appeal is given.

This statement is quite misleading, and shows a failure to understand the contention of appellant's counsel with respect to the right of appellant to a judicial inquiry, as well as a misapprehension of the grounds on which this court decided the Prentis case. The Virginia

Constitution provides a right of appeal by the carrier from a rate-making order of the Corporation Commission to the Supreme Court of Appeals of that State, and that the latter court, on such appeal and the evidence heard by the Commission, shall have power to affirm the rates prescribed by the Commission, or to fix a different rate in lieu thereof, and reverse the order appealed from, with direction to enter its order prescribing the rate found on the appeal to be just and reasonable. Of course, this unusual power to fix the rates of a railroad carrier is legislative power vested in the Virginia Court of Appeals. In the language of this court that court had "the last legislative word."

We contend for no such legislative power in the Kentucky courts, but we do contend that the McChord Act denies to railroad carriers any appeal to such courts from the rate-making orders of the Commission, wherein said courts may exercise their *judicial* powers to review the justness or reasonableness of the rates thereby prescribed, and if such rates, upon an investigation and hearing, affording due process of law, are found to be unreasonable or insufficient to yield just compensation for the "services thereafter rendered," said courts may reverse the action of the Commission and declare its orders void and unenforcible on that account.

Our contentions, arguments, and citation of authorities on this branch of the case are fully presented in Part V of our original brief, pages 77-101.

8. **The Remedy Provided in the McChord Act for the Enforcement of the Commission's Rate-making Orders is Exclusive of All Others.**

In the brief for appellees (pp. 38-40) it is claimed that the Commission has power and authority to enforce obedience to its rate-making orders by civil proceedings. They do not pretend there is any express statute which so provides, nor do they cite any decision of the Court of Appeals of Kentucky, holding such a remedy exists. The Commission has been granted no *general* powers to enforce the rates it prescribes for the observance of railroad carriers otherwise than by indictment to recover the statutory penalties, as provided in the McChord Act.

It is true, under Section 821, Kentucky Statutes (Appendix to our original brief, p. 197), it is made the duty of the Commission "to see that the *laws* relating to all railroads, except street, are faithfully executed." But that requirement does not clothe the Commission with power to enforce its rate-making orders, except as provided in the McChord Act, the only statute undertaking to grant to it power to make rates.

Section 821, however, was sufficient (as held in *Commonwealth* v. *Louisville & Nashville Railroad Co.*, 120 Ky. 91) to vest in the Commission power to make an order under the special law imposing the duty on a railroad company to operate daily, except Sunday, at least one passenger train over its line each way. That suit did not relate to rates at all, but was brought by the Commonwealth's Attorney in the name of the Commonwealth to compel compliance with this special law, after the Commission had made an order requiring the railroad company to do so. There the duty to operate

passenger trains was one owing to the Commonwealth, having been imposed by a particular statute, and it was proper to bring the suit against the railroad company in the name of the Commonwealth.

We need not go further than the McChord Act itself to ascertain the *manner* in which its provisions are to be enforced. At the close of Section 1 thereof it is provided that if the railroad company or any officer, agent, or employe charge, collect, or receive a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by the Commission, each shall be deemed guilty of extortion, and upon conviction shall be fined and subjected to the severe penalties therein set forth.

Section 2 defines the courts which shall have jurisdiction of the offenses of extortion for which the railroad company, its officers, agents, and employes, respectively, may be prosecuted.

Section 3 provides that the prosecutions under the Act shall be by *indictment*, and Section 4 provides that all such prosecutions shall be commenced within two years after the offense shall have been committed.

When the title of the Act is examined we find among its objects and purposes therein stated these: "*and prescribing the manner of enforcing the provisions of this Act*, and penalties for the violation of its provisions." (Section 820a, Kentucky Statutes; our original brief, pp. 3-5.)

We insist, therefore, upon the application of the maxim, *expressio unius est exclusio alterius*.

Upon the grounds and authorities presented herein and in our original brief, it is respectfully submitted

that the order appealed from should be reversed, with direction to the court below to grant the interlocutory injunction prayed for by appellant.

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Points and Authorities.

I.

THE ORDER OF THE RAILROAD COMMISSION OF KENTUCKY WOULD, IF ENFORCED, DIRECTLY AND NECESSARILY AMOUNT TO AND OPERATE AS AN INTERFERENCE WITH AND A REGULATION OF INTERSTATE COMMERCE, AND IS UNCONSTITUTIONAL AND VOID ON THAT ACCOUNT.

A.

Appellees Misapprehend the Facts Upon Which this Proposition is Maintained.

B.

In Addition, the Facts Heretofore Set Forth in Support of this Proposition there is to be Considered the Fact, of Which the Court Will Take Judicial Notice, that the Elements of Intrastate Traffic Handled on Interstate Railroads and the Elements of Interstate Traffic Handled on Such Railroads are so Intermixed, Interdependent, Indivisible and Inseparable that it is Impossible in Connection with Such Railroads to Regulate or Adjust the One Kind of Traffic Without Regulating, Adjusting and Interfering with the Other Kind of Traffic.

Northern Pacific R'y Co. v. Keyes, 91 Fed. 47, 52.

"The Workings of the Railroads," by Prof. Logan G. McPherson, Lecturer on Transportation at Johns Hopkins University, (p. 91).

"American Railway Transportation," by Mr. Emory R. Johnson, Assistant Professor of Transportation and Commerce, University of Pennsylvania, member Isthmian Canal Commission, 1889-1903 (pp. 272-274).

South & North Alabama Railroad Co. v. Pilgreen, 62 Ala. 307.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 37.

C.

The Authorities Cited by Appellees Are Not in Conflict With Appellant's Proposition; and Where Appellees' Conclusions of Law in this Respect are Opposed to the Proposition, Such Conclusions of Law Are Not Supported by the Authorities Cited.

Shepard v. Northern Pacific R'y Co., 184 Fed. 765.
Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204.
County of Mobile v. Kimball, 102 U. S. 691.
Gibbons v. Ogden, 9 Wheat. 1, 195.
The Daniel Ball v. United States, 10 Wall. 557, 564.
Western Union Telegraph Co. v. Texas, 105 U. S. 460.
Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27.
Sands v. Manistee River Improvement Co., 123 U. S. 288.
Missouri Pacific R'y Co. v. Larabee Flour Mills Co., 211 U. S. 612.
McNeill v. Southern R'y Co., 202 U. S. 543.
Allen v. Pullman's Palace Car Co., 191 U. S. 171, 180.
Pullman Co. v. Kansas, 216 U. S. 56.
Employer's Liability Cases, 207 U. S. 463.
Southern Railway Co. v. United States, 222 U. S. 20.

New York, *ex rel.* Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 26.
Pabst Brewing Co. v. Crenshaw, 198 U. S. 17, 30.
In re Rahrer, 140 U. S. 545, 562.
Southern R'y Co. v. King, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. Texas, 210 U. S. 217, 227.
Henderson v. Mayor of New York, 92 U. S. 259, 268.
Houston & Texas Central R. R. Co. v. Mayes, 201 U. S. 321, 328, 331.
Farmers Loan & Trust Co., 116 U. S. 307.
Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503.
Louisville & Nashville R. R. Co. v. Eubank, 184 U. S. 27.
Northern Pacific R'y Co. v. North Dakota, 216 U. S. 579.
Missouri, Kansas & Texas R'y v. Haber, 169 U. S. 613.
Lake Shore & Michigan Southern R. Co. v. Ohio, 173 U. S. 285.

D.

The Federal Power Over Commerce is Exclusive Whenever a Uniform Rule of Regulation is Required.

Gibbons. v. Ogden, 19 Wheat. 1, 196, 224, 225, 231.
Cooley v. Board, 12 How. 299, 319.
State Freight Tax, 15 Wall. 232, 280.
Welton v. Missouri, 91 U. S. 275, 280-282.
Henderson v. Mayor, 92 U. S. 259, 272.
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203-204.
Northern Securities Co. v. United States, 193 U. S. 197, Dissenting Opinion of White, J., the Chief Justice, Peckham and Holmes, JJ.
The Federalist, Nos. 7 and 22.
Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 100-101.
N. Y., N. H. & H. R. R. Co. v. I. C. C., 200 U. S. 361, 391.
Passenger Cases, 7 How. 282, 399-400.

E.

The Federal Power Over Commerce is Exclusive Not Only With Respect to Interstate Traffic, But Also With Respect to Intrastate Traffic Which Extends to or Affects Other States.

Gibbons v. Ogden, 9 Wheat. 1, 136, 195.
G. C. & S. F. R'y Co. v. Hefley, 158 U. S. 98, 103.
Ex parte Young, 209 U. S. 1, 47.

F.

The Test of the Validity of the State Regulation is to be Found in Its Effect Upon Commerce Among the States.

Gibbons v. *Ogden*, 9 Wheat. 1, 195.
Southern R'y v. *King*, 217 U. S. 524, 533.
G. H. & S. A. R'y Co. v. *Texas*, 210 U. S. 217, 227.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1, 27.
Henderson v. *Mayor of New York*, 92 U. S. 259, 268.

II.

MISLEADING OR ERRONEOUS STATEMENTS IN THE BRIEF FOR APPELLEES CORRECTED, AND CERTAIN ARGUMENTS THEREIN REFUTED.

1. **The Quantity of the Commodities Covered by the Rates Complained of Shipped to Consignees Other than Distillers.**

2. **Assertion of Appellees' Counsel that the Bill is Defective in Not Alleging Facts.**

3. **Does the Record Show the Rates Prescribed by the Commission's Order are Arbitrary?**

4. **The Record Shows the Commission Exceeded Its Powers and Jurisdiction and the Orders Complained of Are Void, Within the Doctrine Announced in Southern Pacific Co. v. Interstate Commerce Commission (Willamette Valley Case), 219 U. S. 43.**

14 I. C. C. Rep. 61.
Interstate Commerce Commission v. Chicago Great Western R'y Co., 209 U. S. 119-20.
Lake Shore & M. S. v. Smith, 173 U. S. 684, 697.
Ex parte Young, 209 U. S. 147.

5. **The Nature of the Hearing to Which a Carrier is Entitled With Respect to the Reasonableness of Rates Prescribed for Its Future Services Under the Decision of this Court in Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota, 134 U. S. 418.**

Ex parte Young, 209 U. S. 147.
Southern Pacific Co. v. Board of Railroad Commissioners of California, 78 Fed. 236.
Western Union Telegraph Co. v. Myatt, State Solicitor, *et al.*, 98 Fed. 335.
Interstate Commerce Commission v. Union Pacific R. Co., *et al.*, decided January 9, 1912.
Louisiana R. R. Commission v. Cumberland Telephone Co., 212 U. S. 414, 420.

6. **The Contention of Appellees' Counsel that the Kentucky Railroad Commission Possesses Judicial Powers is Untenable.**

Hannibal Bridge Co. v. United States, 221 U. S. 194.
General Statutes, Ed. 1888, p. 1028.
Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210.

7. **Nature of the Action of the Courts, Were an Appeal Allowed, Under the McChord Act, From a Rate-Making Order of the Commission.**

8. **The Remedy Provided in the McChord Act for the Enforcement of the Commission's Rate-making Orders is Exclusive of all Others.**

Kentucky Statutes, Sec. 820a, 821.
Commonwealth v. Louisville & Nashville R. R. Co., 120 Ky. 91.

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CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. ~~210~~ 23

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - Appellant,

versus

ADAM T. SILER, LAURENCE B. FINN and LEW P. TARLTON, Individually and as Constituting the Railroad Commission of Kentucky, - - - - - - - Appellees.

Supplemental Brief for Appellees.

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Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 507.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellant*,

vs.

ADAM T. SILER, LAURENCE B. FINN AND LEW P. TARLTON, INDIVIDUALLY AND AS CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY, - - - - - - - - - - *Appellees.*

SUPPLEMENTAL BRIEF FOR APPELLEES.

I.

The McChord Act does not deny due process of law because it fails to provide for a review by the courts of the reasonableness of rates prescribed by the Railroad Commission.

That due process of law does not require that the reasonableness of rates prescribed by an administrative body pursuant to legislative authority shall be subject to review by the courts, for any other purpose than to determine whether or not they are so low as to amount to the taking of property without due process of law, and

that the right of review for that purpose need not be expressly given by statute, is so well settled by a long line of cases, as shown in our original brief, pp. 13-21, that it seems that it ought not to be necessary to discuss that question at this late day.

Some of the statements of counsel for appellant, however, both in their original brief and in their reply brief as to what was decided by this court in Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, make it necessary to again consider that case. The court there held the statute in question to be void because it did not provide for a hearing by the Commission. The court said:

> "No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the Commission, the company appeared before it by its agent, and the Commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

There is nothing to show that the carrier was given any opportunity to be heard, and the court distinctly says that while there was some investigation it did not appear what the character of that investigation was. The mere fact that the agent of the company appeared before the Commission does not show that the carrier

had a hearing, or was given any opportunity to introduce any evidence, and the court says, in effect, that there was no hearing, or at least that it did not appear that there was a hearing, there being nothing to show what the character of the investigation was, or how the result was arrived at.

As the statute did not provide for a hearing it can not be readily inferred that there was such a hearing as constituted due process of law. But however that may be, we are now trying to ascertain the ground upon which the court based its decision, and the fact that the court said that neither the nature of the investigation nor how the result was arrived at appeared, and commented upon the fact that the statute provided for no notice or hearing, shows that the court considered that no hearing was had.

Besides, the court was passing upon the validity of the statute *as construed by the Supreme Court of Minnesota.* Under that construction the carrier was not entitled to a hearing before the Commission, and was not entitled to a hearing before the courts even as to whether or not the property of the carrier was taken without due process of law.

This court made it clear that a hearing by a court is not necessary to constitute due process of law, and that a hearing before the Commission was all that was required, provided the Commission possessed the "machinery of a court of justice." The statement that no summons or notice was provided for, and no opportunity to introduce witnesses, shows what the court regarded

as the machinery of a court of justice. In conclusion the court said:

> "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Over and over again the court referred to the absence of an investigation by judicial machinery, thus showing that the court could not have regarded a hearing by a court as essential, as it would have been easy to have said so if that had been the meaning. The ninth paragraph of Mr. Justice Miller's concurring opinion shows what he regarded as one of the grounds upon which the majority opinion was based. Mr. Justice Miller there said:

> "I do not agree that it was necessary to the validity of the action of the Commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the Legislature to have given such notice if it had established such rates by legislative enactment."

That the Kentucky Railroad Commission has the machinery of a court of justice, or "judicial machinery," can not be seriously questioned. Section 827 of Kentucky Statutes provides that the Commission shall have power "to issue subpoenas for the attendance of witnesses, and to administer oaths" and penalties are provided for the refusal of witnesses to obey subpoenas issued by the Commission or to testify. By the McChord Act, Section 820A of the Kentucky Statutes, the Commission is required to give ten days notice of the filing of complaints, and to hear such "statements, arguments or evidence offered by the parties as the Commission may deem relevant." Of course, if the Commission should arbitrarily refuse to hear material evidence offered by the carrier any order it might make fixing a rate would be declared void by the courts.

This court, however, is the best judge of the meaning and effect of its own decisions, and the interpretation which the court in San Diego Land & Town Co. v. National City, 174 U. S. 739, placed upon its opinion in Chicago, etc., Railway Co. v. Minnesota, *supra*, as shown on page 18 of our original brief, is conclusive. Counsel have persistently ignored that interpretation, and it is unnecessary to notice it further here. In San Diego Land & Town Co. v. National City the court did not think it necessary that the tribunal which fixed the rates should even have the *machinery* of a court of justice, the rates there involved being fixed by a municipal board. Nor did the court think it necessary that there should be a provision in the statute for a review of the rates by

any court. The right to go into a court of equity under the general principles of equity jurisprudence for the protection of constitutional rights was all that was regarded as necessary. The trouble in Chicago, etc., R. Co. v. Minnesota, *supra,* was that that right was cut off by the Supreme Court of Minnesota, which refused to permit the carrier to show that the rates prescribed were so low as to take its property without due process of law.

Counsel for appellant say, on page 73 of their original brief, that the Kentucky Railroad Tax cases 115 U. S. 321 cited by the lower court are not in point in a rate case as to what constitutes due process of law because those were tax cases, but this court seems to have thought otherwise in San Diego Land & Town Co. v. National City, 174 U. S. 739.

In Ex Parte Young, 209 U. S. 123, the court at page 127 cited Chicago, etc., R. Co. v. Minnesota as holding that if a law be such as to make the decision of the legislature or of a Commission conclusive "as to the sufficiency of the rates" the law is unconstitutional, and the court then held that the penalties prescribed by the law there involved were so excessive as to preclude an inquiry by the courts as to whether or not the rates were confiscatory, and that for that reason the provisions for penalties were void. The court then proceeded to hold that the circuit court had jurisdiction to inquire whether or not the rates were confiscatory, which makes it clear that the court by the phrase "as to the sufficiency of the rates" meant the sufficiency of the rates to yield a fair return to the carrier on his investment. If the

omission of the statute to provide for a review had been sufficient to invalidate the statute that would have ended the case, and the circuit court would have had no occasion to inquire as to whether or not the rates were confiscatory.

On page 88 of their original brief counsel for appellant say that the case of Chicago, etc., R. Co. v. Minnesota, 134 U. S. 418, "was not a case of *confiscation* at all." Let us see whether or not that is an accurate statement. That was a writ of error to review a judgment of the Supreme Court of the State of Minnesota awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company, requiring it to comply with and order of the Railroad and Warehouse Commission of that State by withdrawing its rates and charges on milk and substituting therefor certain rates prescribed by the Commission. The court in its statement of the case said:

> "On the 23d of December,1887, the company filed its return to the alternative writ, in which it set up:
>
> (1) That it was not competent for the Legislature of Minnesota to delegate to a Commission the power of fixing rates for transportation, and that the Act of March 7, 1887, so far as it attempted to confer upon the Commission power to establish rates for the transportation of freight and passengers, was void under the Constitution of the State;
>
> (2) That the company, as the owner of its railroad, franchises, equipment and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the

provision that such rates should be fair and reasonable; that the establishing of such rates by the State against the will of the company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a taking, and depriving the company, of its property without due process of law, in violation of said Section 1, and therefore void and of no effect;

(3) That the rate of 3 cents per gallon as a freight for carrying milk in ten-gallon cans on passenger trains from Owatonna and Fairbault respectively to St. Paul and Minneapolis was a reasonable, fair and just rate; that the rate of 2½ cents per gallon, in ten-gallon cans, so fixed and established by the Commission, was not a reasonable, fair or just compensation to the company for the service rendered; and that the establishing of such rate by the Commission, against the will of the company, was *pro tanto* a taking of its property without due process of law, in violation of said Section 1."

The court refused to permit the carrier to introduce any testimony whatever in support of its return to the writ and directed a peremptory mandamus to issue requiring the carrier to comply with the requirements of the Commission.

By its return the carrier certainly did seek to avoid the enforcement of the order of the Commission upon the ground that the rates were so low as to deprive it of its property without due process of law, and whatever may be the test applied for the purpose of determining whether or not rates are so low as to amount to the taking of property without due process of law it is

certain that when rates are that low they are confiscatory. The Supreme Court of Minnesota refused to permit the carrier to be heard upon that question, and required the carrier's rates to be changed to conform to the order of the Commission. The State courts were thus forever closed to the carrier without a hearing at any time. The ground upon which the State court refused to give the carrier a hearing as to whether or not the rates were confiscatory was not that the facts stated in the return were not sufficient to show that the rates were confiscatory, but that the statute did not contemplate that there should be a hearing as to that matter. But this court in the case of Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, quoted from on page 20 of our original brief, held that it will be presumed that the State courts are open for the inquiry as to whether or not the rates are so low as to violate constitutional rights until the contrary appears, strongly intimating that rates fixed even without notice or hearing might be valid if not arbitrarily fixed. And as Mr. Justice Miller said in his concurring opinion in Chicago, etc., R. Co. v. Minnesota, *supra*, there seems to be no more reason for notice and hearing where a Commission prescribes rates pursuant to legislative authority than there is for notice and hearing where a legislature prescribes rates.

In the case at bar, however, it is conceded that the carrier had the fullest opportunity to be heard under a statute according that right, and was heard.

II.

The allegation that there was no evidence before the Commission tending to show what "was or might be a just or reasonable rate" does not show that the Commission exceeded its power in prescribing rates.

The allegation that there was no evidence before the Commission tending to show what might be a just or reasonable rate is found in Paragraph XI of the bill, and the connection in which it is made is significant. After stating that the only subject matter that was brought before the Commission for investigation was the making and fixing of rates on the commodities in question when used for distilling purposes, the complainant says:

> "This complainant states absolutely that the evidence that was adduced at said hearing and investigation had no proper relation to the justness or reasonableness of rates for transporting as aforesaid the commodities and supplies when to be used for distilling purposes, and it states that no evidence whatsoever was adduced at the hearing or investigation aforesaid, which showed or tended to show in the slightest degree what was or might be a just or reasonable rate to be charged, collected, or received by defendant for transportation of the commodities between the respective points of origin and of destination named, and, therefore, the subject-matter of the justness and reasonableness of rates for transporting the commodities aforementioned between the points of origin and of destination named for all purposes and without regard to the use to which they were to be applied, was a matter *coram non judice* said Commission at the hearing and in-

vestigation aforementioned, and its said orders thereon were and are null and void." (Tr., p. 20.)

It will be noted that the complaint is that under the complaint and evidence the only question before the Commission was as to the reasonableness of rates on the commodities in question when used for distilling purposes, and that the Commission for that reason exceeded its power when it went further and fixed rates on the commodities when used for other purposes, and all the allegations made in that connection must be regarded as intended to raise only that question. The complaint filed before the Commission, however, shows that complaint was made of the rates without regard to the purposes for which the commodities were used (Tr., p. 33), and so the claim that the Commission had no jurisdiction to pass upon any question except the reasonableness of the rates for distilling purposes falls to the ground.

Taking the allegation that there was no evidence tending to show what might be a just or reasonable rate out of its setting, and treating it as intended to charge that the want of evidence tending to show what might be a just or reasonable rate was sufficient to deprive the Commission of jurisdiction for any purpose, then it seems clear that the allegation states only a conclusion of law. In arriving at the meaning of the pleader we must consider this allegation in connection with the allegation in Paragraph XI of the bill (Tr., p. 19) to the effect that there was no evidence tending to show that the rates were "in and of themselves" unjust, unreasonable or extortionate. This language in connection with the state-

ment that the evidence bore no "proper relation" to the reasonableness of rates on the commodities in question when used for distilling purposes, suggests very strongly that the pleader was trying to satisfy his conscience by evasive allegations, and the court is authorized to conclude that the pleader meant that comparisons of the rates in question with the rates on other lines, or with the rates which the carrier had previously maintained, did not tend to show that the existing rates were "in and of themselves" unreasonable. But accepting the allegation as a statement of fact, and as meaning that the evidence did not tend to show what might be a just or reasonable rate on the commodities in question when used for any purpose, it does not show that the Commission exceeded its power. Regardless of any mistakes made by the Commission in the inferences which it drew from the evidence, the law presumes that the rates which it has fixed are reasonable and the burden is upon the carrier to show that they are unreasonable.

Minneapolis, etc., R. Co. v. Minnesota, 186 U. S. 257.

Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co., 212 U. S. 414.

If no evidence was heard which tended to show what might be a just or reasonable rate, it was the fault of the carrier. The carrier says, in effect, that even though the rates prescribed are altogether reasonable, and the Commission may have had knowledge of facts which showed that they would be reasonable, the rates can not be en-

forced if the evidence heard by the Commission did not tend to show what would be a reasonable rate.

The statute does not attempt to fix the burden of proof, and the Commission may adopt any rules it pleases as to that matter, provided it gives the carrier full opportunity to be heard.

No provision of the Constitution has been pointed out which requires that the Commission should base its finding upon evidence heard, and in view of the fact that the statute authorizes the Commission to initiate the proceeding, it certainly can not be contended that the Commission is required to do more than to give the railroad company an opportunity to introduce all the evidence it desires to introduce.

Accepting as facts all the legal conclusions of the bill, the most that can be claimed for the appellant is that the Railroad Commission placed upon the carrier the burden of showing that the rates it had for many years maintained on grain and other commodities used in the manufacture of whiskey and its preparation for market would not be reasonable rates on the same commodities when used for other purposes. We have the right to assume that the carrier refused to introduce any evidence whatever which would throw any light upon those matters, and that being true it can not complain that the evidence heard by the Commission did not tend to show what would be a just and reasonable rate.

Under the Act to Regulate Commerce as amended June 18, 1910, the burden is upon a carrier to justify an increase in his interstate rates, and it has never been

suggested that Congress did not have the power to impose this burden. While the McChord Act does not give the Railroad Commission the power to suspend an increase of rates, yet if the Commission has prescribed reasonable rates its order certainly can not be declared void because the Commission may have found those rates to be reasonable upon the ground that the carrier had for many years given the same rates to the largest shippers of the commodities to which the rates apply, and had shown no reason for giving them lower rates than other shippers. The courts can not declare an order of the Commission to be void merely because the Commission may have supposed that the evidence heard tended to show the rate which it prescribed to be reasonable when in fact the evidence did not tend to show what might be a reasonable rate. A judgment of a court is not void even though there be no evidence whatever to support it, and for a much stronger reason an order of a Railroad Commission as to rates can not be declared void because the Commission may have erred in supposing that the evidence which it heard was relevant to the question which it was considering. Section 781 of the Kentucky Statutes requires all the railroad companies operating in the State to file their tariffs with the Commission, and the Commission had the right to consider those tariffs for purposes of comparison, although not introduced in evidence. There was little other evidence, if any, that could have been considered that would have tended to show what would be a just or reasonable rate except evidence as to the cost of the service, and as the carrier

alone could furnish that evidence, the failure to produce it must be charged to the carrier.

While we insist that even under the rules which this court has laid down for testing the validity of orders of the Interstate Commerce Commission the rate order of the Kentucky Railroad Commission here complained of must be upheld, the power which the courts have to review the rate orders of the Interstate Commerce Commission is not the test of their power to review the rate orders of the Kentucky Railroad Commission. By the Act to Regulate Commerce the power is expressly given to the courts to review the rate orders of the Interstate Commerce Commission, and it is merely a question as to what weight the courts will give the conclusions of that tribunal in the absence of any provision in the statute as to that matter.

In the case of Interstate Commerce Commission v. Union Pacific Railway Company decided January 9, 1912, Mr. Justice Lamar, referring to the Interstate Commerce Commission, said:

> "Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The McChord Act contains no provision for review by the courts, and, therefore, the *conclusion* of the Railroad Commission is not subject to review. If the Com-

mission kept within its statutory power, the only question is whether or not its order violates some constitutional right of the carrier. In one breath counsel for appellant ask the court to hold the statute to be void because it provides for no review by the courts, and in the next they ask the court to set aside the order because of an erroneous conclusion of the Commission as to what the evidence tended to show. If the statute provides, in effect, that there shall be no review by the courts of the conclusion of the Commission, as counsel for appellant claim, as well as concede, that it does, and the statute is valid notwithstanding that fact, then it is not clear how the courts can inquire as to the correctness of the conclusion of the Commission as to whether or not the evidence tended to show what was a just and reasonable rate.

Even if the bare allegation that there was no evidence before the Commission tending to show what might be a just or reasonable rate would be good on demurrer, the allegation must be supported by some evidence to authorize an injunction, as it was merely a statement of the opinion of the officer of the defendant who verified the bill. There is nothing in the bill to authorize the inference that the three Railroad Commissioners did not in good faith believe that the evidence tended to show that the rates prescribed were reasonable, and that the existing rates of the carrier were unreasonable, and we affirmatively show that they did in good faith so believe, and yet the court is asked to grant an injunction because one of the defendant's officers disagrees

with those public officials as to the effect of the evidence. The affidavits filed in support of the bill make no reference to the evidence which was heard, while the affidavits for defendant (Tr., pp. 65-71) show that many witnesses were examined, and that the Commission carefully considered the evidence and believed that it did show the existing rates to be unreasonable and the rates prescribed to be reasonable. While the affiants did not attempt to state the substance or effect of all the evidence it does appear from their affidavits that the evidence showed that for many years the defendant under similar conditions maintained the rates which the Railroad Commission has prescribed, the only difference being that during those years those rates were given to distillers alone, but it also appears from the affidavits that the evidence showed that at some of the points involved the distillers were the only persons receiving the commodities to which the rates apply, and that at none of the points involved were the shipments to others than distillers sufficient to affect the carrier's revenue to any appreciable extent. So far as appears the carrier did not attempt to give any excuse whatever for the increase of rates, or to show that any other rates would be affected. The rates on a particular commodity which a carrier has for many years given to the principal shippers of that commodity, when no change of condition is shown, certainly do tend to show to some extent what would be a reasonable rate on that commodity for the future.

While this court said in Interstate Commerce Commission v. Chicago G. W. R. Co., 209 U. S. 108, 119, that "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done" the court also said: "Undoubtedly when rates are changed, the carrier making the change must, when properly called upon, be able to give a good reason therefor." But all that we are contending for here is that the fact that the carrier has for many years given certain rates to the principal shippers of a commodity tends to show to some extent what would be a just and reasonable rate to all shippers of that commodity, no change of conditions being shown.

In Alabama & Vicksburg Railway Co. v. Mississippi Railroad Commission, 203 U. S. 496, the court by Mr. Justice Brewer said:

> "While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a State Railroad Commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the Commission is justified in making that rate the rate for all."

We insist, however, that the court can not assume that the evidence as to the old rate was the only evidence heard by the Commission.

The case of Railroad Commission v. Cumberland Telephone & Telegraph Company, 212 U. S. 414, is an instructive one. In that case the complainant, Cumberland Telephone & Telegraph Company, went into the

Circuit Court of the United States for the Eastern District of Louisiana seeking to enjoin the enforcement of certain rates prescribed by the Railroad Commission of that State for use by the telephone company therein. Article 284 of the Constitution of Louisiana authorized the Railroad Commission to adopt just and reasonable rates for telephone companies operating within that State, and Article 285 provided that if any corporation subject to the Commission should be dissatisfied with its decision fixing or adopting any rate, the corporation thus dissatisfied might file a petition setting forth the cause of its objection in any court of competent jurisdiction. The telephone company sought to enjoin the enforcement of the rates both upon the ground that they were in violation of the fourteenth amendment of the Constitution of the United States, and of the Constitution of the State of Louisiana. It appeared that the Commission after examining the returns of the telephone company made to the Commission issued an order to show cause why its rates should not be decreased, and on the final hearing on the return of the order to show cause took into consideration both the statement presented by the complainant on the return of that order, and also the statements or returns previously filed by the company. It was argued that as the rates were fixed by merely arbitrary conjecture by the Commission and not based on investigation or the exercise of judgment and discretion, there was no presumption of the correctness of the rates. In answer to that argument the court, by Mr. Justice Peckham, said:

"Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon the investigation, the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns; but that is far from showing that the Commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, can not be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated, must be regarded as *prima facie* fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable."

In that case the court was reviewing the order of the Commission under an express provision of the Constitution of Louisiana giving a right of review, and yet the court said that it mattered not what mistakes the Commission may have made in its inferences from the evidence there was still a presumption that the rates prescribed were reasonable.

It was the duty of the carrier to preserve the evidence heard by the Railroad Commission if it desired to question the correctness of the conclusions or inferences

which the Commission might draw from the evidence. It is quite as important for the court to have before it the evidence heard by the Commission in order to determine whether or not there was any testimony which tended to support the conclusions of the Commission as it would be for the court to have that evidence before it in order to determine the weight of the evidence. If the evidence was preserved the official report of that evidence is the best evidence, and nothing else can be received upon the hearing of the motion for a preliminary injunction, unless the absence of that report is accounted for. If the evidence was not preserved the court must assume that there was some evidence to support the conclusions of the Commission. There is no reason why the complainant should not at least state the substance of the evidence.

In Shoemaker v. National Mechanics Bank, 31 Md. 396, the court held that an injunction was properly refused where the complainant failed to produce copies of pleadings or exhibits in support of averments as to the objects and purposes of suits the prosecution of which was sought to be enjoined.

In the absence of a stenographic report of the evidence, if the preliminary injunction should be granted upon the ground that there was no evidence tending to show what might be a reasonable rate, the court would have to depend upon the memory of witnesses in determining what the evidence tended to show. Surely, the validity of the order of the Commission can not depend upon anything so uncertain. In the cases in which this

court passes upon the validity of orders of the Interstate Commerce Commission it has before it the evidence heard by the Commission and not merely the memory of witnesses as to that evidence.

III.

The bill does not allege that the rates prescribed by the Commission are not compensatory.

On pages 38-40 of their reply brief counsel for appellant complain that the statement in our original brief that no facts are alleged in the bill to show that the action of the Commission was unreasonable, or that the rates prescribed are unreasonably low, is not in accordance with the facts, and in support of that complaint refer to the allegation in Paragraph XX. of the first amended bill to the effect that the rates prescribed are unreasonable because of the "fact" that if the order of the Commission is enforced the carrier will be compelled to accept upon interstate as well as intrastate traffic, rates which are unreasonably low and not compensatory. The pleader was most careful in that connection not to state that the rates prescribed are unreasonably low, the allegation being that those rates are *unreasonable* because of the "fact" that if they are put into effect the carrier will be compelled to accept other rates which are not compensatory. The pleader had alleged that the enforcement of the rates prescribed would require a readjustment of both interstate and intrastate rates, and the allegation is that because of that "fact"

the carrier will be compelled to accept rates which will not be fair compensation. The statement that the rates prescribed are unreasonable for that reason excludes the idea that the rates prescribed when considered alone are unreasonably low. If the court may consider the fact that the carrier, as a matter of business policy, may, as a result of the Commission's order, have to reduce other rates, and that its rates considered as a whole will then be not compensatory, of course the fixing of a single rate by the Commission would involve the whole body of rates of the carrier, and there could be no such thing as a regulation of anything less than the whole body of rates. Even if the effect upon other rates were sufficient to show that the rates prescribed are confiscatory, the ultimate fact that the rates prescribed are so low as to take the carriers property without due process of law, would have to be alleged, an allegation of evidential facts alone not being sufficient.

The appellant very earnestly insisted in L. & N. R. Co. v. Siler, 213 U. S. 175, that the Legislature did not intend by the McChord Act to confer the power upon the Commission to prescribe schedules of rates, and that this could not have been intended because the Commission could not fairly perform such a task, but the argument here made that the Commission in fixing a single rate must consider the whole body of rates is, in effect, an argument that justice can not be done except by the making of a schedule of rates.

In determining whether or not a certain rate would be a reasonable rate for the future it is, of course, proper

for the Commission to consider the relation of that rate to other rates, but the court, in determining whether or not the rate prescribed by the Commission is confiscatory, must assume all rates not attacked to be reasonable. In no other way would it be possible to uphold a statute authorizing a Commission to prescribe one rate at a time. The circumstances and conditions under which shipments are made between any two points are never exactly the same as the circumstances and conditions under which shipments are made between other points, and, therefore, it can never be said with certainty that the Commission would have to require other rates to be changed to conform to the rate in question. It must be remembered that the courts have no power to pass upon what would be a reasonable rate for the future until that question has been passed upon by the Commission, and then only for the purpose of determining whether or not the rate prescribed is so low as to take property without due process of law. Therefore, the court can not determine what would be a reasonable rate between other points for the future, or whether or not the Commission would have to change other rates. It may be safely assumed that appellant will not reduce other rates until it is compelled to do so. The allegation that the carrier will be compelled to do certain things if the order of the Commission is enforced is not a statement of an existing fact, and is, therefore, not admitted by the demurrer.

Southern Railway Company v. King, 217 U. S. 524.

Counsel seem to suppose that the allegation in Paragraph XIII of their bill (Reply Brief, p. 39) to the effect that the existing rates of the carrier are not unreasonably high is equivalent to an allegation that the rates prescribed by the Commission are unreasonably low, but we submit that there must be a field of reasonableness affording room for the play of judgment as to what is a reasonable rate, and that it does not follow that because a certain rate is not unreasonably high any lower rate is unreasonably low. Paragraph XIII is based upon the theory that the Fourteenth Amendment guarantees to a common carrier the right to fix his own rates, and that other rates can not be prescribed unless those rates are extortionate. That this is not the law is attested by the many cases in which the power of Legislatures and of Railroad Commissions to prescribe schedules of rates have been upheld.

Not only are no *facts* alleged in the bill to show that the rates prescribed are so low as to deprive the carrier of its property without due process of law, but it is manifest that the pleader did not intend to place the complainant's case upon that ground, and that such general allegations as the bill contains as to the unreasonableness of the rates were made by way of inducement, and to show merely the supposed hardship of the enforcement of the statute, or to show that complainant was entitled to question the validity of the statute.

The argument that the court can not apply the same test in determining whether or not a single rate is confiscatory that it applies in determining whether or not

a body of rates is confiscatory is not relevant here, as there must, in any event, be an allegation that the rate or rates in question are so low as to deprive the carrier of his property without due process of law before the court can interfere upon that ground, and such an allegation is wanting here. But even if such an allegation were made it would not be sufficient without the further allegation of some fact from which the court might conclude that the rate would deprive the carrier of his property without due process of law.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, 401.

IV.

Affidavits do not show that rates prescribed are not compensatory.

The affidavit of C. B. Compton, appellant's Traffic Manager (Tr. p. 45), and of D. M. Goodwyn, appellant's General Freight Agent (Tr. p. 59), are devoted largely to a statement of the changes in other rates which will become necessary if the order of the Commission is enforced, but neither of the affiants states any fact tending to show that after all such changes are made the rates as a whole will not yield the carrier a handsome return. It is true that the affiants state that the carrier will be compelled to accept rates which will not yield the carrier a "fair and reasonable" return, but the court will hardly accept the opinions of the traffic officials of a railroad company as to what is a fair and reasonable return to

the company for the service performed. Presumably, the rates are originally fixed by the traffic officials at what they think will yield the carrier a fair and reasonable compensation for the service rendered, and if their judgment as to that matter is to be accepted it is useless to have a Commission to regulate rates. But the charge which the carrier will be compelled to make in other rates is purely speculative, and there is no claim by either of the affiiants that the rates prescribed by the order complained of would not yield the carrier a very large profit.

There is no allegation in the bill or statement in the supporting affidavits which shows that the rates prescribed by the Commission between the points named in its order are relatively lower than rates between other points. The statement that the rates are lower than the rates between other points means nothing in view of the fact that the rates prescribed by the order of the Commission are for different distances, and vary in amount, and the distances to points compared are not given. The most that appears is that the rates prescribed vary from appellant's so-called standard rates, and the claim is that the appellant will, therefore, be compelled to vary from its standard rates between other points, but the court is not enlightened as to the basis upon which appellant's "standard rates" are established. One might suppose from their designation that they were fixed upon a mileage basis or according to some fixed standard, but a very slight examination will show that such is not the case. The table embodied in D. M. Goodwyn's affidavit (Tr., p. 62) shows in the

column of "Standard rates" a rate of 12 cents on grain for a distance of 129 miles and the same rate for 67 miles, while it shows in the same column a rate of 15 cents for a distance of 73 miles. These rates show that distance is not a factor in the making of appellant's so-called standard rates, and there is nowhere in the record a statement that these rates rest upon any fixed basis, or anything to show that a departure from them would not tend to bring about equality. As to the claim that the order disregards the long and short haul law, there is nothing to show that the commodities to which the rates in question apply move at all to any of the shorter distance points named in the affidavits, or that those points furnish any traffic whatever to the appellant. Besides, as suggested in our original brief the presumption is that if the rates prescribed are reasonable, higher rates for shorter distances within the longer distances to which the rates prescribed apply are unreasonable.

Affiants compare the rates prescribed by the order of the Commission of August 10, 1910, with the rates prescribed by a general order made in June, 1906, which this court held in L. & N. R. Co. v. Siler, et al, 213 U. S. 175, to be beyond the power of the Commission, but that order, which is the best evidence of the rates prescribed therein, is not before the court, and the affiants fail to refer to the fact that the order provided that the rates then in existence should not be exceeded. The rates prescribed by the order of August 10, 1910, are the same rates which were in force at the time of the order of June, 1906, ex-

cept that at that time the rates only applied to distillers, while they now apply to all shippers, and therefore those rates as applied to distillers could not be increased under the order of June, 1906.

A table embodied in Mr. Goodwyn's affidavit (Tr., p. 62) shows that the average revenue per ton per mile which the rates on grain prescribed by the Commissioner's order will yield is a fraction over two cents, and that the lowest revenue per ton per mile which any of the rates on grain fixed by the order will yield is about 15 mills. The Interstate Commerce Commission has repeatedly said that grain is a very low-grade freight. In the matter of proposed advances in freight rates, 9 I. C. C. R. 382, Mr. Commissioner Prouty, said (page 396):

> "Now of all commodities, grain is among the very most desirable species of traffic."

And again (page 398):

> "Grain is a commodity which upon all accounts is entitled to one of the lowest rates accorded to any article."

In the Matter of the Investigation of Advances in Grain Rates 21 I. C. C. Rep. 22 (33), the Interstate Commerce Commission said:

> "Defendants contend that distance is only one of the factors considered in making the rates, and say that commercial conditions, competition, free movement and volume of traffic, and other factors were also considered. But in the view of the Commission, on no traffic, except it be lumber, are per-

ton-per-mile earnings more helpful than on grain. The present average rate per ton per mile on wheat in South Dakota is 8.38 mills. The average for the four States of Iowa, Minnesota, North and South Dakota is 8.48 mills."

The statistics of the railroads of the country for 1909, published by the Interstate Commerce Commission from reports made by the companies to that body, show that the average revenue per ton per mile on the entire system of the Louisville & Nashville Railroad Company is 7.6 mills. (Statistics of Railways in the United States for 1909, page 808). Of course, the hauls we have here are short as compared with the average haul on the entire system, but when rates for an average haul of 64 miles upon a commodity of very low grade yield an average revenue per ton per mile almost three times as great as the average on all commodities, the court will be slow to conclude that the rates are in any sense confiscatory, although the average haul may be considerably shorter than the average haul on the entire system. In the case of Mayor, etc., of Wichita v. A. T. & S. F. Railway Company, *et al*, 9, I. C. C. Rep. 558, the Interstate Commerce Commission commented on the fact that the rate on coal attacked in that case yielded a revenue per ton per mile which almost equaled the average revenue per ton per mile upon the entire system, which the Commission seemed to think was conclusive evidence that the rate was too high in view of the fact that coal was a low grade freight.

The affiants state in general terms that the rates prescribed by the Commission are lower than the rates in effect in several other States, but they make no reference to the comparison of rates made by the evidence heard by the Commission. But it matters not what the affidavits show when there is no allegation in the bill of any fact which tends to show that the rates prescribed are not fully compensatory.

V.

The McChord Act does not confer judicial power on the Railroad Commission in violation of either Section 28 or Section 109 of the Kentucky Constitution.

Sections 27 and 28 of the Kentucky Constitution read as follows:

"Section 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive to another; and those which are judicial to another.

"Section 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Section 109 of the same instrument reads as follows:

"The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the

Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The statement of counsel for appellant on page 68 of their reply brief that "to sustain the finality of the rate-making orders of the Kentucky Railroad Commission" we are driven to the contention that the Commission is vested with judicial powers misrepresents our argument. In all that we said as to the judicial power of the Railroad Commission we were answering the objection of counsel for appellant that the McChord Act confers judicial power upon the Commission, and that part of our argument clearly shows that we were not then attempting to sustain the finality of the action of the Commission. We argued that the power conferred upon the Commission to determine whether or not the existing rates of a carrier are extortionate is not a judicial power, being merely the basis of legislative action, but that even if it could be so considered the Legislature was authorized to confer that power in view of the power of the same general nature conferred by Section 218 of the Constitution, and of the fact that the Commission had exercised judicial power under the former Constitution. The fixing of a rate is either administrative or legislative, and it is not necessary to make it appear that the Commission has judicial power in order to sustain the finality of the action of the Commission. The action of the Commission is final only in the sense that any other legislative action is final, the courts being always open for the purpose of applying the test of

the Constitution. It is true that the court in Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418, did hold that where the carrier was excluded from the courts even for the purpose of showing that his property had been taken without due process of law, rates prescribed by the Commission could not be upheld unless the Commission had the machinery of a court of justice, and the statute provided for a hearing before that body; but even in that state of case it is not necessary that the Commission should have "judicial power" in the broad sense in which that phrase is used in Section 109 of the Kentucky Constitution.

Much stress is laid upon the following language of Mr. Justice Brewer in Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U. S. 479, 499:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

In a later part of his opinion, however, Mr. Justice Brewer said (p. 509):

> "It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country."

It is inconceivable that any inquiry and examination an administrative body might make for the purpose of

determining the reasonableness of a rate for the future would not include an inquiry as to the reasonableness of existing rates, and so it is clear that when Mr. Justice Brewer said that the inquiry whether the rates which have been charged and collected are reasonable is a judicial act he meant an inquiry made for the purpose of making, and followed by, an order restoring the excess in the event the rate should be found to be unreasonable. The mere inquiry itself would be only administrative.

Counsel question our statement that under a statute in force prior to the adoption of the present Kentucky Constitution (Gen. Stats. ed. 1888, p. 1028) the Railroad Commission had judicial power, but they fail to refer to the fact that the Commission by that statute was given the power to render a money judgment upon which execution might issue upon the mere filing of the judgment in the Clerk's office of the Circuit Court. Section 19 of the Act of April 6, 1882, originally creating the Railroad Commission read as follows:

> "Said commissioners shall hear and determine complaints under the first and second sections of this act. Such complaints shall be made to said commissioners in writing, and they shall give the company complained of not less than ten days' notice of the time and place of hearing the same. They shall hear the evidence of the parties, and award judgment as authorized by this act. Unless the same be satisfied, the chairman shall, within ten days, file a copy of said award in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have jurisdiction of

such controversy, on which execution shall issue as on other judgments: Provided, that any party dissatisfied with said award may, within ten days, file a traverse thereof with the clerk of said court, who shall docket the same for trial at the next term. If the matter in controversy shall exceed twenty dollars, said court, on demand of either party, shall empanel a jury to try the same. If it does not exceed that sum, the court shall hear and summarily decide the same without the intervention of a jury."

The provision of that statute authorizing execution on the judgment of the Commission remained in force for about eight years, and provision was then made for filing the award in the clerk's office of the circuit court and issuing summons thereon, the award to be *prima facie* evidence of its correctness upon the trial in the circuit court. (Acts 1889-90, Vol. 1, p. 25.) That statute was in force when the Constitution was adopted.

If the original Act did not confer judicial power we are unable to understand what would constitute such power. The fact that the carrier might have the judgment reviewed did not take away its judicial character. Even the later statute which was in force when the Constitution was adopted gave power to perform a judicial act, according to the contention of counsel for appellant, who insist that every inquiry as to whether or not a reasonable rate has been charged in the past is judicial in its nature.

But counsel for appellant say that the finding under that statute was not final, while the finding under the McChord Act that the carrier is charging an extortionate rate is final, and for that reason judicial. To that

objection the case of Field v. Clark, 143 U. S. 649, upon which counsel for appellant rely, seems to be a conclusive answer. In that case the court held that an Act of Congress which gave to the President the power to suspend the provisions of the Tariff Act relating to the future introduction into this country of the products of another country when he found that such country was imposing unreasonable duties upon the introduction into that country of the products of the United States, did not delegate legislative power, and that the President exercised only an executive duty in determining whether or not the duties imposed by another country upon the products of the United States were unreasonable, as he was "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

By the McChord Act the Railroad Commission is made the agent of the law-making department to ascertain whether or not the carrier is charging an extortionate rate, and it is only in the event of such a finding that the law is to take effect. An inquiry as to whether or not existing tariff duties are unreasonable does not differ in its character in the slightest degree from an inquiry as to whether or not the rates of a carrier are unreasonable.

While that part of our original argument to which counsel for appellant refer on page 68 of their reply brief was not made for the purpose of sustaining the finality of the action of the Commission, because we did not regard it as at all necessary to establish the proposi-

tion that the Commission has judicial power in order to give validity to legislative action, yet if that were necessary we think there can be no doubt that the provision of Section 209 of the Kentucky Constitution that the duties and powers of the Railroad Commission created by that section shall be "regulated by law" gave power to the Legislature to confer upon the Railroad Commission such judicial power as might be necessary to finally determine the reasonableness of rates, subject only to the power of the courts to protect the carrier against the taking of his property without due process of law.

In Gibbs v. Board of Aldermen of City of Louisville, 99 Ky. 490, the court held that a statute conferring power upon the Board of Aldermen "sitting as a court" to remove executive and ministerial officers was not in violation of Section 109 of the Constitution.

The court said:

> "Section 160 of the present Constitution left with the Legislature the right of determining the manner in and the cause for which city officials may be removed; and, while the board of aldermen may be termed, in one sense, a court, it is an organized municipal body, with the power to remove city officials, and is not a court of impeachment, nor was it ever contemplated by the framers of the Constitution that city officers could be removed by impeachment proceedings before the State senate."

All this discussion, however, as to judicial power seems to be unnecessary in view of the fact that the Legislature would have the right to accept as reasonable any rates which the Railroad Commission might find to

be reasonable, and to declare those rates to be the only lawful rates, without requiring the Commission to first find existing rates to be unreasonable. That being true, it is difficult to understand how the carrier can complain of that requirement.

The Federal Courts are always slow to declare a State statute to be in violation of the State Constitution when the State courts have never passed upon the validity of the statute. In Michigan Central R. Co. v. Powers, 201 U. S. 245, the court, by Mr. Justice Brewer, said:

> "Undoubtedly a Federal Court has the jurisdiction, and, when the question is properly presented, it may often become its duty, to pass upon an alleged conflict between a statute and the State Constitution, even before the question has been considered by the State tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit, and call for consideration and determination. At the same time the Federal courts will be reluctant to adjudge a State statute to be in conflict with the State Constitution before that question has been considered by the State tribunals."

It is significant that the validity of the McChord Act has never yet been passed upon by the Court of Appeals of Kentucky although more than twelve years have passed since it was enacted. It is safe to assume that during that time many orders reducing rates have been made by the Railroad Commission, and that the railroads have carefully refrained from testing the validity

of the statute in the State courts for the reason that they know that such a test would result in a decision upholding the statute.

VI.

The Willamette Valley Case (Southern Pacific Co. v. Interstate Commerce Commission), 219 U. S. 43, has no application because there is no allegation in the bill that the Railroad Commission prescribed the rates complained of upon any other ground than that the carrier's rates were unreasonable, and that the rates prescribed were reasonable rates for the service to be performed.

There is not even a suggestion in the bill that the Railroad Commission did not in good faith believe that the existing rates of the carrier were extortionate, or that the rates prescribed were reasonable, and that being true there is not the slightest ground for the argument that the rates prescribed by the Railroad Commission were prescribed by that tribunal because of some equitable consideration. This court based its decision in the Willamette Valley case upon the ground that the reasons given by the Interstate Commerce Commission for its order showed that it did not find that the rates which it prescribed were reasonable rates. In the case at bar the Railroad Commission distinctly found that the existing rates were extortionate, and that the rates prescribed were reasonable, and those findings can not be impeached upon a mere suspicion as to what may have influenced the Commission.

VII.

The Federal Court had no jurisdiction to consider the reasonableness of the rates except for the purpose of determining whether or not they deprived the carrier of its property without due process of law.

The carrier went into the Federal Court upon the ground that the McChord Act gave finality to the action of the Railroad Commission, and thus deprived it of its property without due process of law. That being true, it would seem that it can not have relief upon the ground that the action of the Commission was not final. While the Federal Court when it has acquired jurisdiction ordinarily gives full relief, yet the complainant ought not to have relief upon a ground altogether inconsistent with one of the grounds upon which it invoked the jurisdiction of the court.

On page 94 of their original brief counsel for appellant concede that in Louisana R. R. Commission v. Cumberland Telegraph & Telephone Co., 212 U. S. 414 (420) this court considered the question as to whether or not the rates were unreasonably low as distinguished from the question as to whether or not they were confiscatory, only because the State law provided for such a review, and because there was diversity of citizenship, which gave the court jurisdiction of the question as to whether or not the State law was violated. In the case at bar there is no diversity of citizenship, and no State statute providing for a review, and so it would seem that the court can consider only the question as to whether

or not the rates are confiscatory. It is quite certain that if the court does consider the question as to whether or not the Commission made some mistake in its inferences from the evidence it must do so solely upon the ground that the State law authorizes such a review, as we must, for the purpose of this part of the argument, assume the statute to be valid. Besides, as already suggested in another part of our argument it seems that the general allegations of the bill as to the unreasonableness of the rates were not intended for any other purpose than to show complainant's right to attack the statute.

Indeed, it does not seem that counsel for appellant are insisting that the court has power to grant an injunction upon the ground that the rates prescribed are unreasonably low unless they are so low as to amount to the taking of property without due process of law, and there is no assignment of error which would authorize such a contention. We do not speak with assurance as to the contention of counsel for appellant because it is not clear whether or not they are insisting that the court may review the action of the Commission just as if the statute provided for a review.

VIII.

The failure of the Railroad Company to prove before the Commission the effect on other rates which the changes asked for in existing rates would have is a bar to an injunction on the ground that the effect would be to reduce other rates.

The ground upon which the carrier complains that the rates prescribed, if enforced, will deprive it of its property without due process of law is that it will be compelled, if those rates are enforced, to change other rates, and that its rates when thus changed will not be compensatory. So far as appears no such claim was made before the Railroad Commission, and no facts presented to that tribunal even tending to show that the changes in the rates complained of which the Commission was asked to make would have the effect upon other rates now claimed for them. The facts as to the effect upon other rates which the changes in existing rates which were asked for would have were peculiarly within the knowledge of the carrier, and it alone could present them to the Commission. The probable effect upon other rates of the proposed change was, therefore, strictly matter of defense. That being true, it follows that a Federal Court of equity ought not to grant an injunction to relieve the carrier of the consequences of its deliberate failure to present the facts to the tribunal established by the State to pass upon them. It can not be assumed that the Railroad Commission would not have given to

those facts whatever weight this court may now think they ought to have.

Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

While the order of the Commission is administrative or legislative and not judicial, yet the reason of the rule that one who has negligently failed to defend an action at law can not have an injunction to restrain the enforcement of a judgment against him resulting from that negligence applies here with much force.

In Creath's Adm'r. v. Sims, 5 How. 192, the court by Mr. Justice Daniel, after stating that a court of equity "will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence" said:

> "Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

In Hendrickson v. Hinchley 17 How. 443 the court by Mr. Justice Curtis said:

> "Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate and complete remedy at law, have purposely omitted to avail themselves of it."

The Railroad Commission is the tribunal established by the Kentucky Constitution to pass upon rate ques-

tions, and while it may be that the railroad company can not be required to anticipate just what rates the Commission will prescribe, and, therefore, be required to show to the Commission in advance that those rates would be confiscatory, yet where the Commission is asked to prescribe a certain rate, and it does so, the railroad company can not then have an injunction to restrain the enforcement of the rate prescribed upon the ground that other rates will be affected, unless it brought that fact to the attention of the Commission, or gives some excuse for not doing so. In any event, the carrier would not be wholly without remedy at law, and a court of equity ought not to relieve it against the consequences of its own negligence, especially as the Commission may revoke or modify its order at any time.

If it could be assumed that the facts relied on were presented to the Commission the finding of the Commission as to the effect of its order on other rates than those prescribed ought to be accepted as final and conclusive.

Of course, we do not concede that the mere fact that other rates might be affected, or might have to be changed, would furnish any reason why the rates prescribed should not be enforced.

IX.

The carrier can not complain that discrimination would result from the enforcement of the order of the Commission.

In addition to what we said in our original brief in regard to discrimination pp. 54-56 we would suggest that the appellant will not be heard to complain that other persons would be prejudicially affected by the rates prescribed.

In Interstate Commerce Commission v. Chicago R. I. & P. R. Co., 218 U. S. 88, in which a decree enjoining the enforcement of an order of the Interstate Commerce Commission reducing certain rates was reviewed, the court referring to the statement of the Commission that other rates were also too high, but that it would not reduce them because that was not the time to precipitate such a violent change as would follow such a reduction, and also to the objection made by the railroad companies to the order of the Commission on that account, the court by Mr. Justice McKenna said (109):

> "It is very clear that by a voluntary reduction by them of such rates, the equality of opportunity dependent upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to

a party who complains of a grievance which is not his."

Again, the court said (110):

> "The order of the Commission, besides, is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities, or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion."

X.

The traffic regulated by the order of the Railroad Commission does not extend to or affect other States, and the regulation is, therefore, not a regulation of interstate commerce.

On page 13 of their reply brief counsel for appellant say:

> "It is evident that that part of commerce 'among' the States, both interstate and intrastate, which is carried on by interstate railroads is national in its character and demands uniformity of regulation, and that, therefore, Congress alone can legislate with respect to such traffic, and when Congress has not legislated it necessarily follows that such traffic is to be free from all legislation whatever."

Counsel thus boldly declare that Congress has exclusive power to regulate all the traffic of an interstate

railroad, both interstate and intrastate, brushing aside the many decisions of this court upholding the power of the States to regulate that traffic which is purely internal, even though carried on by a railroad engaged also in interstate traffic.

By a typographical error the word "and" was omitted from the quotation made from the case of "The Daniel Ball," 10 Wall 557, on page 67 of our original brief, and our attention was first called to the fact by the reply brief for appellant. We are inclined to think, however, that the omission of the word "and" does not materially change the meaning of the sentence. Of course, no commerce which is carried on wholly within the limits of a single State "extends to" other States. It is clear, therefore, that when the court said that the commerce clause excludes from Federal control "that commerce which is carried on entirely within the limits of the State, and does not extend to or affect other States," the court used the words "and does not extend to or affect other States" for the purpose of stating a quality which is possessed by all commerce carried on entirely within the limits of the State, and not as implying that there might be commerce carried on wholly within the limits of a State which might extend to other States. Of course, if the words "extend to" were not used as words of limitation the word "affect" was not used as a word of limitation. But the decision of this case will not turn upon the effect of the word "and" in that sentence. The court there held that an agency of interstate com-

merce was, as to that commerce, subject to Federal control although it operated wholly within the limits of a single State, and the effect of the regulation was not considered. The jurisdiction of Congress depended upon the nature of the commerce regulated. The commerce that is regulated by the order of the Kentucky Railroad Commission here involved undoubtedly neither extends to nor affects any other State than Kentucky. It is the nature of the commerce regulated, and not the effect of the rate prescribed, which determines whether the State or Congress has the power of regulation.

That commerce "among" the States within the meaning of the Commerce clause is only that commerce which crosses State lines was settled by the case of Gibbons v. Ogden, 9 Wheaton 195-6. In Wabash, etc., R. Co. v. Illinois, 118 U. S. 557 (573) the court by Mr. Justice Miller said:

> "The argument on this subject can never be better stated than it is by Chief Justice Marshall in Gibbons v. Odgen, 9 Wheat. 195-6. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States; and the power of Congress to regulate it exists wherever that commerce is found."

XI.

This court has repeatedly recognized the distinction between direct and indirect burdens upon interstate commerce as affecting the validity of State regulations.

On page 21 of their reply counsel for appellant say:

> "The argument which appellees make as to direct and indirect burdens merely amounts to saying that a State may do that indirectly which it is prohibited by the Constitution of the United States from doing directly. The mere statement of this absurdity refutes it. It is clear that where this court has referred to direct and indirect effects of State action in its decisions the word 'indirectly' has been used in the sense of 'incidentally,' or 'immaterially.'"

The distinction between direct and indirect burdens upon interstate commerce has been made so often by this court that it does not seem altogether respectful to the court to characterize that distinction as absurd. Counsel say that in all cases where the court has seemed to make that distinction the words "direct burdens" are to be taken as meaning "material burdens," and that the words "indirect burdens" are to be taken as meaning "immaterial burdens." Let us make these substitutions in the last sentence of the quotation made on page 72 of our original brief from the case of Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.

In that case it was admitted that Congress by the Wilson Act had, in effect, surrendered to the State the power to regulate the sale of liquor while still in the

original packages in which it had come into the State, but the argument was that if the regulation made in the exercise of that power operated to affect interstate commerce it was void. The court said that if the power to regulate existed the effect which the exercise of that power might have upon interstate commerce could not take away the power, and that to uphold the proposition contended for "would overthrow the distinction between direct and indirect burdens upon interstate commerce, by means of which the harmonious working of our constitutional system has been made possible." The proposition there asserted was substantially that which is asserted here, the only difference being that the power of the State to regulate existed there because Congress had, in effect, surrendered that power to the State, while here the power of the State to regulate exists because it has never been surrendered by the State, and yet the court in that case said that the indirect effect upon interstate commerce of the exercise by the State of its exclusive power of regulation could not destroy the power. It is clear, therefore, that if the statement of the court in that connection that the harmonious working of our constitutional system has been made possible by the distinction between direct and indirect burdens upon interstate commerce be accepted as meaning that the harmonious working of our constitutional system has been made possible by the distinction between material and immaterial burdens upon interstate commerce, the argument of the court means nothing. The reasoning of the court inevitably leads to the conclusion that the

exclusive power of the State to regulate intrastate commerce can not be destroyed by the indirect effect which the exercise of that power may have upon interstate commerce.

It is unnecessary to refer again to the many cases in which the distinction between direct and indirect burdens has been recognized, but we ask the court to consider once more the cases of Louisville & Nashville Railroad Company v. Kentucky, 183 U. S. 503, and Louisville & Nashville Railroad Co. v. Eubank, 184 Ky. 27, as illustrating clearly that distinction. In the former of those cases the court held that section 218 of the Kentucky Constitution prohibiting a carrier from charging more for a longer than for a shorter distance over the same line in the same direction affected interstate commerce only indirectly, and was therefore not in violation of the Commerce clause of the Federal Constitution. In that particular case the railroad company was punished for charging a higher rate on coal from Altamont to Lebanon than it charged to Louisville, all within the State of Kentucky. The company was, therefore, compelled to lower its rate to Lebanon or to increase its rate to Louisville, and we may assume that it increased its rate to Louisville. But when the rate to Louisville was increased that increase probably made necessary an increase in the interstate rate to New Albany, Indiana, and no doubt the probable necessity of such a change in the interstate rate was pressed upon the court as a reason why it should hold that the State law was a regulation of interstate commerce.

Again, let us suppose that when the law took effect appellant was maintaining lower rates from Louisville to Covington than it charged to Latonia, an intermediate point, and that the rate to Covington was increased to avoid the penalty of the law. Appellant says, however, that it maintains the same rates to and from Cincinnati that it maintains to and from Covington, and so the increase in the rate to Covington resulted in an increase of the rate to Cincinnati.

When we consider that the Kentucky long and short haul law applies to every railroad in Kentucky, and that conditions similar to those we have supposed may have existed on each one of those roads engaged in interstate traffic at every point on the border of the State, there is no escape from the conclusion that the burden which that law imposes is far greater than the burden which the regulation here complained of imposes upon interstate commerce, and yet this court held that as the burden was an indirect one the statute was not an unconstitutional regulation of interstate commerce. If, as counsel for appellant insist, the court meant that the burden was immaterial, it follows that the burden here is immaterial.

The suggestion that the court intended to hold in that case that it would determine in each case as it arises whether or not the statute, if applied to that state of facts, would materially burden interstate commerce, can hardly be seriously made. In L. & N. R. Co. v. Kentucky, 183 U. S. 503, a penalty was imposed upon the carrier for violating the law, and it is not conceivable

that the court intended to hold that the guilt of the carrier could depend upon what a court or jury might determine as to the effect of the statute upon interstate commerce appearing from the facts developed upon the trial. No such question was submitted to the jury in that case, or considered by the court. The law, if thus construed, would be void as an *ex post facto* law within the principles of the case of L. & N. R. Co. v. Commonwealth, 99 Ky. 132. Besides, the validity of each conviction under the statute would have to be finally determined by this court.

But counsel say that when the court came to consider the case of L. & N. R. Co. v. Eubank, 184 U. S. 27, it held the statute to be void to the extent that it regulated traffic which extended to or affected other States, and that is true. The court had held in L. & N. R. Co. v. Kentucky, 183 U. S. 503, that the statute applied only where the long haul and short haul were both wholly within the State of Kentucky, but when a Kentucky court held otherwise in the Eubank case this court held that the State law was void to the extent that it prohibited the carrier from discriminating in favor of the interstate shipper, and the reason given was that this was a direct burden upon interstate commerce, the law being a direct regulation of the rate to the longer distance point. The court, by Mr. Justice Peckham, said:

> "It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance)

from Nashville to Louisville, for a railroad carrier, that the State might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The State might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the State, than Congress provided for the long interstate haul. The reason is that Congress in the case presented is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it, the State could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce directly or indirectly by the State, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists."

That case and the case of L. & N. R. Co. v. Kentucky, 183 U. S. 503, when considered together, illustrate very clearly the distinction between direct burdens and indirect burdens upon interstate commerce.

In Alabama & Vicksburg Railway Co. v. Railroad Commission of Mississippi, 203 U. S. 496, the court considered and upheld an order of the Mississippi Railroad Commission requiring the plaintiff in error to put in a certain flat rate on grain and grain products from Vicksburg to Meridian, that rate being then restricted by the carrier to shipments which had come to Vicksburg within ninety (90) days over the Vicksburg, Shreveport

& Pacific Railroad, and being given under the pretense of a "rebilling" arrangement. The court by Mr. Justice Brewer referring to the power of the State to enforce equality among its citizens said (501):

> "That a State has such power can not be doubted, and it can not be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the Company."

Again, the court said:

> "The State may insist upon equality as between all its citizens, and that equality can not be defeated in respect to any local shipments by arrangements made with or to favor outside companies."

The arrangement which the carrier had in force was made to encourage shipments into the State over a particular interstate railroad, and although the State regulation put an end to that arrangement, and to that extent affected interstate commerce, the court held that the State had the power to require equality as among its citizens although interstate commerce might be indirectly affected.

In support of their contention that a State regulation which even indirectly affects interstate commerce is void counsel for appellant cite the case of Western Union Tel. Co. v. Kansas, 216 U. S. 1. In that case the court held that a statute of the State of Kansas, requiring a foreign telegraph company to pay as a "charter fee" a given per cent of its entire authorized capital stock as a condition of continuing to do local business in the

State, was invalid under the commerce clause of the Federal Constitution as amounting to a burden and tax on the company's interstate business.

The court held that the tax was a direct tax upon interstate commerce although it was imposed as a condition of doing local business. When it was determined that the tax was a tax upon interstate commerce, the purpose for which it was imposed was immaterial. The court did not hold that the tax was imposed upon intrastate business and was invalid because it affected interstate business, but held that it was imposed upon the interstate business of the telegraph company. As the power to tax means the power to destroy no taxation of interstate business by the State is permitted. The purpose of the tax is immaterial.

XII.

The power of the State to regulate intrastate traffic is not determined by the actual effect of the regulation as shown by the proof in each case as it arises.

The Railroad Commission either acted within the power conferred by the statute, or it exceeded that power. If it kept within the power granted its action is valid, provided the statute is valid, and if it exceeded the power granted its action is void. If the order of the Commission is held to be void because it is a regulation of interstate commerce, the real ground of the decision will be that the statute did not authorize the Commission to regulate interstate commerce. That the regu-

lation we have here was authorized by the terms of the statute can not be doubted. Is the statute, therefore, an unconstitutional regulation of interstate commerce because under it the Commission has the power to make such an order as that of which the carrier is here complaining? The question presented, therefore, is just that which was presented in L. & N. R. Co. v. Kentucky, 183 U. S. 503. The court in that case did not consider whether or not the statute if applied in that particular case would directly affect interstate commerce, but whether it would do so in any case to which it might by its terms apply, the facts of the particular case being considered, no doubt, as illustrating what might be done under the statute. The McChord Act, therefore, must be considered in the same way. The facts of this case illustrate what may be done under the statute, but they are to be considered only for that purpose. Just as the court in the case of L. & N. R. Co. v. Kentucky, *supra*, considered, as we may assume, that the carriers might be compelled to increase their rates to points on the border of the State, thus requiring them from considerations of business policy to increase rates to points just beyond the border, so the court here will consider that the Railroad Commission, under the McChord Act, may do that which the long and short haul law itself does, and will determine whether or not that fact causes the statute to be a direct regulation of interstate commerce. In L. & N. R. Co. v. Eubank, 184 U. S. 27, the court held that the long and short haul law was a direct regulation of the rate to the longer distance point, and so the long

and short haul law directly regulates the rate to every point within the State of Kentucky, since every point is a longer distance point with reference to some other point.

The court can not hold the McChord Act to be void as a regulation of interstate commerce without overruling a long line of cases in which similar statutes have been upheld, and so the argument is that the order of the Commission and not the statute is void. But the court, as shown in our original brief, pp. 106-107, has repeatedly held that statutes prescribing complete schedules of intrastate rates do not directly affect interstate commerce, and it follows, of course, that an order prescribing only a few intrastate rates does not directly affect interstate commerce.

If the Legislature had prescribed a schedule of rates would the court take up each rate separately and hear evidence as to its effect upon interstate rates, and then declare the statute to be a regulation of interstate commerce as to some rates and not a regulation of interstate commerce as to other rates? We hardly think so, and yet that is what would have to be done in such a case if the court should hold that the effect of each rate prescribed by the Commission as shown by the evidence is to determine whether or not the regulation of that rate is a regulation of interstate commerce.

Again, if the validity of each order prescribing a rate is to depend upon what the evidence shows as to its effect upon interstate commerce there can never be a penalty imposed for a violation of such an order of

the Commission as the provisions of the statute imposing penalties for its violation would be void for uncertainty, since the guilt of the carrier could not be made to depend upon what a court or jury might conclude from the evidence as to the effect of the order upon interstate commerce.

L. & N. R. Co. v. Commonwealth, 99 Ky. 132.

But if counsel for appellant are right in their contention that the intrastate traffic and the interstate traffic of an interstate railroad are so interwoven that any regulation of the intrastate traffic must be a regulation of the interstate traffic (Reply brief, p. 4) it is clear, without regard to the reasons already given, that the determination of the question as to whether or not a regulation of intrastate traffic is an unconstitutional regulation of interstate commerce can not depend upon the evidence in the particular case as to the effect of the regulation upon interstate commerce, as that is a matter of which the court must take judicial notice. It follows, therefore, that the various cases in which the court has upheld regulations of intrastate rates can not be distinguished upon the ground that the court did not then have before it any evidence showing that the regulation would materially burden interstate commerce, as the court must have taken judicial notice of the effect of the regulation upon interstate commerce.

XIII.

The power of Congress to regulate interstate commerce does not impair the power of the States to adopt regulations for the protection of their people.

In addition to the case of New York, etc., R. Co. v. State of New York 165 U. S. 628, and other cases cited in our original brief in support of this proposition we desire to call the attention of the court to the case of Chicago, etc., Railway Co. v. Arkansas, 219 U. S. 453, in which it was held that a statute of the State of Arkansas prescribing a minimum of three brakemen for freight trains of more than twenty-five cars operated in the State did not amount to an unconstitutional regulation of interstate commerce as applied to the interstate trains of a foreign railway company. In that case the court, by Mr. Justice Harlan, said:

> "It is not too much to say that the State was under an obligation to establish such regulations as were necessary or reasonable for the *safety* of *all* engaged in business or domiciled within its limits. Beyond doubt passengers on interstate carriers while within Arkansas are as fully entitled to the benefits of valid local laws enacted for the public safety as are citizens of the State. Local statutes directed to such an end have their source in the power of the State, never surrendered, of caring for the public safety of all within its jurisdiction; and the validity under the Constitution of the United States of such statutes is not to be questioned in a Federal court unless they are clearly inconsistent with some power granted to the general govern-

ment, or with some right secured by that instrument, or unless they are purely arbitrary in their nature."

The obligation of the State to protect its citizens against extortion is just as clear as its obligation to protect them from personal injury, and while the State has no power to protect its citizens against extortionate interstate rates for the reason that such power is vested exclusively in Congress, it must have the power to protect them against extortionate intrastate rates, especially when Congress has not attempted to do so. The claim that the State which has granted the power of eminent domain and other valuable privileges to a railroad corporation which it has created has no power to protect its citizens against the carrier's extortionate charges on intrastate traffic merely because the carrier has elected to engage also in interstate commerce, even though Congress while granting protection to interstate shippers refuses to protect intrastate shippers, is so completely refuted by all the adjudged cases bearing on the question that no further argument is needed for that purpose.

XIV.

The claim of a charter contract concedes the power of the State to regulate intrastate rates.

The claim set up in Paragraph XIX of the bill that the provisions of the railroad company's charter prescribing maximum rates constituted a contract with the State by which the company acquired the right to charge

those rates is an unqualified claim, and not a claim in the alternative. If the condition which the State attached to its grant amounted to a contract it must have been binding on both parties, and it could not be binding on either party unless the State, as between it and Congress, had power to regulate the intrastate rates of the carrier. That a State has the right to attach to a franchise which it grants to a railroad corporation the condition that the corporation shall not charge rates in excess of those prescribed in the charter of the corporation can not be doubted, and if the State grants such a franchise reserving the power of regulation, the regulation when subsequently made is just as effective as if it had originally been embraced in the charter. Leaving out of view the fact that the charter in question here was granted for an interstate railroad, it would be rather remarkable if the State could attach the condition to its grant that certain rates should not be exceeded, and the corporation yet be able to avoid that condition as to intrastate rates by electing to become also an interstate carrier. The power to regulate rates is not merely the power to reduce, and if Congress and not the State has the power of regulation that power can not be limited by any contract between the corporation and the State. It is not sufficient, therefore, to say that the powers granted by the State were a sufficient consideration for the undertaking of the corporation, even though the State may have had no power to regulate rates, for the undertaking of the corporation not to exceed the

rates prescribed was not binding on the corporation if Congress had the power of regulation.

In Howard v. Illinois Central R. Co., 207 U. S. 463, in which the first Employer's Liability Act passed by Congress was held to be unconstitutional, the court, by the present Chief Justice, said (502):

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

It follows, therefore, that neither the State nor Congress can impose conditions as to that part of commerce

which it has no power to regulate, and that the power of the State to impose upon a railroad corporation which it creates the obligation not to charge intrastate rates in excess of those prescribed by the State implies the power of the State to regulate those rates. It seems to be conceded that the State had no power to impose any condition as to interstate rates because of the exclusive power of Congress over interstate commerce, and, therefore, the claim that the State *did* have power to impose conditions as to intrastate rates concedes complete power in the State to regulate those rates.

If it be said that the obligation of the corporation not to exceed the rates prescribed in the charter is binding until Congress interferes, the answer is that the power to prescribe maximum rates in the charter implies the power to reserve the right to subsequently prescribe such rates, and the regulation made under that power is binding until Congress acts, even if the power of Congress over intrastate rates be conceded. As shown in our original brief, pp. 82-83, Congress by the first section of the Act to regulate Commerce has expressly elected *not* to regulate intrastate rates, thus leaving in full force the power which the railroad company by its claim of a charter contract concedes to be in the State until Congress acts. The corporation concedes that its contract, if any exists, is repealable by the State, and not only the power of the State to make the contract as to intrastate rates but the power of the State to repeal the contract implies that the power to regulate those rates is in the State and not in Congress. Not only does

the power of the State to prescribe maximum intrastate rates in the charter of the corporation imply the power to regulate those rates, but the existence of that power is conclusive that the validity of the regulation can not depend upon its effect upon existing interstate rates.

XV.

Congress while regulating interstate rates has elected to leave to the States the regulation of intrastate rates, and thereby decided that there need not be uniformity of regulation.

As we have shown in our original brief, pp. 82-84, Congress, by Section One of the Act to Regulate Commerce, has expressly provided that the provisions of that Act shall not apply to the transportation of property "wholly within one State," and as the various States when that Act was last re-enacted had long regulated intrastate rates, that provision, of course, could mean nothing else than that the regulation of those rates was left to the several States. Assuming that Congress has jurisdiction over intrastate rates, we thus have a decision by Congress that it is not desirable that intrastate rates should be regulated uniformly with interstate rates. Whether or not Congress intends that a particular part of Commerce shall be left free from regulation is merely a matter of inference, and while the inaction of Congress in some cases may authorize the inference that Congress intended that there should be no regulation, in other cases, as said in Smith v. Alabama, 124

U. S. 465, the failure of Congress to legislate can only be construed as expressing its intention not to disturb the State regulation which exists. If Congress had any power over intrastate rates, which we deny, it is simply a question as to whether Congress intended to leave the regulation of those rates to the States or to leave them altogether unregulated, and the latter is inconceivable. To leave intrastate rates unregulated while interstate rates are strictly regulated by Congress would certainly not result in uniformity of regulation.

We ask that the judgment appealed from be affirmed.

Respectfully submitted,

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* GARRETT ET AL., CONSTITUTING THE RAILROAD COMMISSION OF KENTUCKY.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 23. Argued April 4, 1912.—Decided December 1, 1913.

The same rule by which the Federal court has jurisdiction to determine all the questions, local as well as Federal, when a Federal question is raised by the bill, governs the application for preliminary injunction under the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

Unless the case imperatively demands such a decision, this court is reluctant to adjudge a state statute to be in conflict with the state constitution before that question has been considered by the state

[1] Original docket title Louisville & Nashville Railroad Company *v.* Siler et al., constituting the Railroad Commission of Kentucky.

tribunals to which the question properly belongs. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245.

Prescribing rates for the future is a legislative and not a judicial act.

In prescribing intrastate rates the legislature of a State may act directly or, in the absence of constitutional restriction, it may commit the authority to do so to a subordinate body; and *held* that the legislature of Kentucky by the act of March 10, 1900, properly authorized the Railroad Commission of that State under certain conditions to fix reasonable intrastate rates for railroad transportation in conformity with the provisions of the constitution of the State.

The legislature may determine what are reasonable rates either directly or through a subordinate body and use methods like those of judicial tribunals to elicit facts without invading the province of the judiciary. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

In this case it does not appear that the State Railroad Commission acted in an arbitrary manner in fixing intrastate railroad rates; nor was it necessary to give legality to its order as to particular rates established to require a reduction in other rates.

Failure in a state statute establishing a railroad commission and giving it authority to fix reasonable rates to provide for an appeal from orders of the commission does not deny the carrier right of access to the courts to review an order that fixes rates so unreasonably low as to be confiscatory and is not an unconstitutional denial of due process of law under the Fourteenth Amendment.

Presumably the State, as well as the Federal, courts are open to a carrier to test the constitutionality of an order made by a railroad commission and to obtain protection by bill in equity against its enforcement if unconstitutional. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265.

Penalties which are so unreasonable and severe as to be an unconstitutional denial of due process of law will not render a rate statute unconstitutional if they are separable, as in this case.

The right of the carrier to make its own intrastate rates is subject to the constitutionally enacted law of the State; in the absence of a legislative rate courts apply the common law in passing upon the reasonableness of the rates, but after legislative rates have been established the courts apply those rates unless there are constitutional objections.

So long as the legislature acts within its proper sphere, courts cannot substitute their judgment with respect to reasonableness of the established rates.

While a State may permit appeals to the courts from the rate making

orders of its railroad commission, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, failure to provide for such an appeal does not deny the carrier due process of law as guaranteed by the Fourteenth Amendment.

Loss in revenue generally follows reductions in rates but that does not necessarily prove that the reduced rates are confiscatory; there must be further proof that they do not allow a fair return for service rendered.

An order of the Railroad Commission of Kentucky made under the act of March 10, 1900, is a legislative act under delegated power and has the same force as if made by the legislature and is for this reason a law passed by the State within the meaning of the contract clause of the Federal Constitution.

A charter provision is not violated under the contract clause by a subsequent state law otherwise legal, if, prior to the enactment of the latter, the chartered corporation has subjected itself to the operation of an amendment to the state constitution reserving the power to alter, amend and repeal charters and franchises.

Minnesota Rate Cases, 230 U. S. 352, followed to the effect that the establishment of railroad rates wholly intrastate by a State Railroad Commission is not an unwarrantable interference with, or a regulation of, interstate commerce.

In an equity suit by a carrier against the members of a State Railroad Commission to restrain enforcement of a rate order under a statute which provided for awards of reparation for failure to comply with the order, the court should not pass upon the validity of any of such awards made to parties not before the court.

186 Fed. Rep. 176, affirmed.

THE facts, which involve the constitutionality under the constitution of Kentucky and also under the Constitution of the United States of the State Railroad Commission Statute of Kentucky and the legality of orders made by the Commission, are stated in the opinion.

Mr. Henry L. Stone and *Mr. Albert S. Brandeis*, with whom *Mr. William G. Dearing* and *Mr. William A. Colston* were on the brief, for appellant.

Mr. Edward W. Hines and *Mr. James Garnett*, Attorney General of the State of Kentucky, with whom *Mr. Charles*

C. McChord, *Mr. J. Van Norman*, *Mr. James Breathitt*, former Attorney General of the State of Kentucky, and *Mr. John F. Lockett* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from an order denying a motion for an interlocutory injunction. *Louisville and Nashville Railroad Co.* v. *Siler*, 186 Fed. Rep. 176. The motion was heard by three judges, and the appeal is taken under § 17 of the act of June 18, 1910, c. 309, 36 Stat. 539, 557.

The suit was brought by the Louisville and Nashville Railroad Company, a corporation organized under the laws of Kentucky, to enjoin the enforcement of two orders made by the Railroad Commission of that State on August 10, 1910. One of these orders prescribed maximum freight rates for certain intrastate traffic, that is, for the transportation of corn, rye, barley, malt, empty barrels, boxes, etc., from three points of origin, Louisville, Covington and Newport, to sixteen points of destination in Kentucky. The second order awarded specified amounts in reparation for payments previously made to the carrier for such transportation in excess of the rates found to be reasonable.

For many years the Railroad Company had given special rates to the owners of distilleries along its lines in Kentucky for the transportation of the commodities above mentioned, which constituted their raw materials and supplies. These rates were withdrawn on March 25, 1910, and what are described as the standard rates of the company, that is, those which had theretofore been charged to others than distillers, were substituted. Thereupon, numerous distillery companies complained to the Railroad Commission of the State, insisting that the new rates were exorbitant and that the former rates were just

and reasonable. After hearing, the Commission sustained the contention of the petitioners and fixed the maximum rates in question. These rates were the same as the special rates which, prior to March 25, 1910, the Railroad Company had given to the distillery companies; but, by the Commission's order, the rates as fixed were made applicable to the transportation between the points stated, of the described commodities without distinction as to persons or as to the use to be made of the commodities by the consignees.

The statute under which the Commission acted, in establishing these rates, is that of March 10, 1900, known as the McChord Act (Kentucky Statutes, § 820a, Carroll's edition, 1909).[1] It provides in substance that when complaint shall be made to the Railroad Commission, accusing any railroad company of charging extortionate rates, or when the Commission shall receive information or have reason to believe that such rates are being charged, it shall be its duty "to hear and determine the matter as speedily as possible." The Commissioners are to give the company complained of not less than ten days' notice, stating the time and place of hearing and the nature of the complaint or matter to be investigated. They "shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been, guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered." The rate so fixed is to be entered as an order on the record book of the Commission; a copy thereof is to be mailed to a representative of the railroad company

[1] This statute is set forth in full in *McChord* v. *L. & N. R. R. Co.*, 183 U. S. 483, 484, 485; and in *Siler* v. *L. & N. R. R. Co.*, 213 U. S. 175, 178-180.

affected, and it is to be "in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record." If the railroad company, or any officer, agent or employé thereof charges a greater rate for like services thereafter, "said company . . . and said officer, agent or employé, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offence in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding conviction in any sum not less than two thousand dollars nor more than five thousand dollars." The Circuit Court, in the appropriate counties as prescribed by the statute, is to have jurisdiction of such prosecutions, which are to be by indictment.

The bill attacked the statute, and the action of the Commission, as violative of the rights secured to the complainant by the Federal Constitution. Objections were also made under the constitution and statutes of the State. Demurrers were filed but upon these no decision was made. The motion for preliminary injunction was heard upon bill and affidavits. In denying the motion, the court did not pass upon the validity of the second order as it was of the opinion that those in whose favor the award of reparation had been made were "necessary parties in interest;" these had not been brought in. 186 Fed. Rep. 176, 203.

First. The order fixing rates.

Because of the Federal questions raised by the bill the Circuit Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an